DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 09-893	
Title	AT&T Mobility LLC, Petitioner v. Vincent Concepcion, et ux.
Docketed	January 26, 2010
Lower Ct.	United States Court of Appeals for the Ninth Circuit
Case Nos.	(08-56394)
Decision Date	October 27, 2009
Questions Presented	

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 25 2010	Petition for a writ of certiorari filed. (Response due February 25, 2010)
Jan 27 2010	Order extending time to file response to petition to and including March 29, 2010.
Jan 29 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents.
Feb 2 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Feb 23 2010	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Feb 25 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Feb 25 2010	Brief amicus curiae of CTIA - The Wireless Association filed.
Feb 25 2010	Brief amicus curiae of DRI - Voice of the Defense Bar filed.
Mar 18 2010	Order further extending time to file response to petition to and including April 26, 2010.
Apr 26 2010	Brief of respondents Vincent Concepcion, and Liza Concepcion in opposition filed.
May 3 2010	Reply of petitioner AT&T Mobility LLC filed.
May 4 2010	DISTRIBUTED for Conference of May 20, 2010.
May 7 2010	Supplemental brief of respondents filed. (Distributed)
May 24 2010	Petition GRANTED.
Jun 15 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 26, 2010.
Jun 15 2010	The time within which to file respondents' brief on the merits is extended to and including September 15, 2010.
Jun 17 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jun 21 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents.
Jul 9 2010	Motion to dispense with printing the joint appendix filed by petitioner AT&T Mobility LLC.
Jul 20 2010	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including August 2, 2010.
Jul 20 2010	The time within which to file respondents' brief on the merits is further

	extended to and including September 22, 2010
Aug 2 2010	Brief of petitioner AT&T Mobility LLC filed
Aug 9 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed
Aug 9 2010	Brief amicus curiae of Center for Class Action Fairness filed
Aug 9 2010	Brief amici curiae of Distinguished Law Professors filed
Aug 9 2010	Brief amicus curiae of Pacific Legal Foundation filed
Aug 9 2010	Brief amici curiae of American Bankers Association, et al. filed
Aug 9 2010	Brief amici curiae of DIRECTV, Inc., et al. filed
Aug 9 2010	Brief amicus curiae of CTIA - The Wireless Association filed
Aug 9 2010	Brief amicus curiae of Equal Employment Advisory Council filed
Aug 9 2010	Brief amicus curiae of DRI - Voice of the Defense Bar filed
Aug 9 2010	Brief amici curiae of South Carolina and Utah filed
Aug 9 2010	Brief amicus curiae of New England Legal Foundation filed
Aug 16 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED
Aug 16 2010	CIRCULATED
Aug 24 2010	SET FOR ARGUMENT ON Tuesday, November 9, 2010
Sep 2 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 7 2010	The time within which to file respondents' brief on the merits is further extended to and including September 29, 2010
Sep 29 2010	Brief of respondents Vincent Concepcion, and Liza Concepcion filed (Distributed)
Sep 30 2010	Brief amicus curiae of National Workrights Institute filed. (Distributed)
Oct 5 2010	Brief amici curiae of Civil Procedure and Complex Litigation Professors filed (Distributed)
Oct 6 2010	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed (Distributed)
Oct 6 2010	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Oct 6 2010	Brief amicus curiae of National Academy of Arbitrators filed. (Distributed)
Oct 6 2010	Brief amici curiae of Contracts Professors filed. (Distributed)
Oct 6 2010	Brief amicus curiae of American Antitrust Institute filed. (Distributed)
Oct 6 2010	Brief amicus curiae of Jonathan C. Kaltwasser filed. (Distributed)
Oct 6 2010	Brief amici curiae of Arbitration Professors filed. (Distributed)
Oct 6 2010	Brief amici curiae of Illinois, et al. filed. (Distributed)
Oct 6 2010	Brief amicus curiae of American Association for Justice filed. (Distributed)
Oct 6 2010	Brief amicus curiae of Constitutional Accountability Center filed. (Distributed)
Oct 6 2010	Brief amici curiae of Legal Aid Society of the District of Columbia and National Consumer Advocacy Organizations filed. (Distributed)
Oct 6 2010	Brief amici curiae of Federal Jurisdiction Professors filed. (Distributed)
Oct 6 2010	Brief amici curiae of Marygrace Conefl, et al. filed. (Distributed)
Oct 29 2010	Reply of petitioner AT&T Mobility LLC filed. (Distributed)
Nov 9 2010	Argued. For petitioner: Andrew J. Pincus, Washington, D.C. For respondents: Deepak Gupta, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09- 09-893 JAN 25 2010

In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

CORPORATE DISCLOSURE STATEMENT

Petitioner AT&T Mobility LLC, a limited liability company, has no parent company. Its members are all privately held companies that are either wholly owned subsidiaries of AT&T Inc., which is publicly traded, or are also limited liability companies whose members are wholly owned subsidiaries of AT&T Inc. No other publicly held corporation has a 10% or more ownership interest in AT&T Mobility LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner AT&T Mobility LLC ("ATTM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 584 F.3d 849. The order of the district court denying ATTM's motion to compel arbitration (*id.* at 17a-54a) is unreported, but is available at 2008 WL 5216255.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. App., *infra*, 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution (Art. VI, cl. 2), provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

> arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

STATEMENT

This petition presents a recurring issue of extraordinary importance to the continued viability of tens of millions of arbitration agreements in the State of California (and elsewhere in the country): whether, consistent with the FAA, a State may condition the enforceability of an arbitration agreement on the availability of class-wide arbitration when that procedure is not necessary to ensure that parties to the agreement are able to vindicate their claims. This Court received briefing and heard argument on the broader question whether States may ever superimpose class procedures on arbitration in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), but could not answer it because the issue had not been presented below. Since then, the need to resolve this issue has increased significantly.

Class-wide arbitration affords none of the benefits of traditional, individual arbitration—it is at least as burdensome, expensive, and time-consuming as litigation—while multiplying the risks enormously because judicial review is so limited. For that reason, hundreds of millions of arbitration agreements require that arbitration proceed on an individual basis.

Most States that have addressed the validity of such agreements have upheld their enforceability, at least when the agreement in question neither imposes substantial costs on the non-drafting party nor limits that party's remedies. Under California law, by contrast, agreements to arbitrate on an individual basis are unenforceable in the consumer context—even when the arbitration provision ensures that the consumer is able to vindicate his or her claims on an individual basis. And the Ninth Circuit has held in this and other cases that the FAA does not preempt that rule because it applies equally to agreements to litigate on an individual basis.

The Ninth Circuit's decision thus effectively invalidates tens of millions of arbitration agreements in California. Moreover, in other cases the Ninth Circuit has extended the impact of its holding to claims by citizens of States other than California, meaning that tens of millions of additional contracts can be avoided by the simple expedient of filing class actions in district courts within this largest of federal circuits. The question whether the FAA preempts state-law rules barring agreements to arbitrate on an individual basis is thus of exceptional importance.

The present case is an ideal vehicle for resolving that long-percolating issue. The courts below found that the Concepcions were "essentially guaranteed" to obtain full relief under ATTM's arbitration provision. App., *infra*, 10a n.9; *see also id.* at 39a-42a. They thus invalidated that provision not because it precluded the Concepcions from vindicating their own claims, but because it precluded them from serving as the agents for the vindication of claims of third parties. Accordingly, no case could better present the question whether the FAA allows States

to superimpose favored procedures—in this case, class actions—on arbitration when those procedures are not necessary to ensure that the parties to the arbitration are able to vindicate their claims. Review by this Court is warranted.

1. The Federal Arbitration Act. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted). In preserving the benefits of arbitration, "Congress * * * had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Indeed, because it "allow[s] parties to avoid the costs of litigation," arbitration benefits individuals with "smaller" claims, such as employees (*Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001)), or "the typical consumer" who otherwise would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery" (*Allied-Bruce*, 513 U.S. at 281).

Section 2 of the FAA commands that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2; emphasis added by the Court). "That is, as a matter of federal law, arbitration agreements and clauses are to be enforced *unless* they are invalid under principles of state law that govern all contracts." *Iberia Credit*

Bureau, Inc. v. *Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir. 2004) (emphasis in original).

This Court has identified "fraud, duress, [and] unconscionability" as examples of such state-law grounds. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). But the fact "[t]hat a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration to special scrutiny." *Iberia Credit Bureau*, 379 F.3d at 167.

In particular, the fact that a state-law rule may apply to both arbitration and judicial proceedings is not enough to bring it within Section 2's savings clause. See *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008) (holding that the FAA preempted a California law that imposed an administrative exhaustion requirement for certain disputes even though that requirement applied to both judicial and arbitral proceedings).

2. California's Unconscionability Law And Its Unique Test For Contracts Requiring That Disputes Be Resolved On An Individual Basis. Under California law, courts "may refuse to enforce" any contract found "to have been unconscionable at the time it was made," or sever or "limit the application of any unconscionable clause" in order "to avoid any unconscionable result." CAL. CIV. CODE § 1670.5(a). The proponent of unconscionability must prove both "procedural" and "substantive" unconscionability. *Armendariz* v. *Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000). Procedural unconscionability focuses on the fairness of the

contracting process, and substantive unconscionability focuses on whether the contract "shock[s] the conscience" (*Belton* v. *Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 649-650 (Ct. App. 2007)) or is one that a person would have to be "under delusion" to accept (*Cal. Grocers Ass'n* v. *Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994) (internal quotation marks omitted)).

Under California's "sliding scale" approach to unconscionability, if "the procedural unconscionability, although extant, [is] not great," the party attacking the term must prove "a greater degree of substantive unfairness." *Marin Storage & Trucking, Inc.* v. *Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 656-657 (Ct. App. 2001).

In the particular context of agreements to resolve disputes on an individual basis, however, the California Supreme Court has adopted a three-part test that bears no resemblance to the foregoing generally applicable unconscionability principles. Under that novel test, such an agreement is unenforceable if it "[(i)] is found in a consumer contract of adhesion [(ii)] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [(iii)] when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005).

3. **ATTM's Arbitration Provision.** ATTM, which was known as Cingular Wireless until January 2007, provides wireless service to over 80 million subscribers, with over 10 million in California alone. The wireless service agreements between ATTM and

its customers long have required the parties to resolve any disputes they may have in individual arbitration. The agreements expressly prohibit arbitrators from conducting class-wide proceedings. See App., *infra*, 3a, 57a, 61a.

AT&TM has revised its arbitration provision over time in order to make individual arbitration a realistic and effective dispute-resolution mechanism for consumers. The version at issue in this case was promulgated in late 2006.[1] A veteran district judge in one of the Nation's busiest districts recently observed that this version of AT&TM's arbitration clause "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski* v. *AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009) (enforcing provision in an individual lawsuit).

The arbitration provision affords customers fair, inexpensive and convenient procedures and, in addition, provides them with affirmative incentives to pursue even small claims on an individual basis.

The procedural safeguards include:

- **The AAA Rules Apply:** Arbitration is conducted under the American Arbitration Association's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;
- **Convenience:** Arbitration takes place "in the county * * * of [the customer's] billing address,"

[1] The arbitration provision is set forth in Appendix C. See App., *infra*, 55a-62a.

and for claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."

- **Cost-free arbitration for non-frivolous claims:** "[AT&TM] will pay all [American Arbitration Association ("AAA")] filing, administration and arbitrator fees" unless the arbitrator determines that the claim "is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))";[2]
- **Small claims court option:** Either party may bring a claim in small claims court in lieu of arbitration; and
- **Full remedies available:** The arbitrator may award the claimant any form of individual relief (including punitive damages and injunctions) that a court could award.

The special incentives to pursue claims through individual arbitration include:

- **$7,500 minimum recovery if arbitral award exceeds AT&TM's last settlement offer:** If the arbitrator awards a California customer relief that is greater than AT&TM's last "written settlement offer made before an arbitrator was selected" but less than $7,500, AT&TM will pay the

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[2] Even if an arbitrator concludes that a consumer's claim is frivolous, the AAA's consumer arbitration rules would cap a consumer's arbitration costs at $125. App., *infra*, 21a n.2.

customer $7,500 rather than the smaller arbitral award;[3]

- **Double attorneys' fees:** If the arbitrator awards the customer more than AT&TM's last written settlement offer, then AT&TM will "pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[4] and
- **AT&TM disclaims right to seek attorneys' fees:** "Although under some laws [AT&TM] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [AT&TM] agrees that it will not seek such an award [from the customer]."

Moreover, AT&TM has made its arbitration procedures easy to use. A customer need only fill out and mail a one-page Notice of Dispute form that AT&TM has posted on its web site. App., *infra*, 22a-23a.

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[3] Under the 2006 provision, the amount of the minimum payment is tied to the jurisdictional maximum of the customer's local small claims court. App., *infra*, 60a. In California, the jurisdictional limit for small claims court is $7,500. CAL. CODE CIV. PROC. § 116.221. In 2009, AT&TM revised this aspect of its arbitration provision to make the minimum payment a uniform amount—$10,000—across the country. See http://www.att.com/disputeresolution.

[4] This contractual right to double attorneys' fees "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." App., *infra*, 61a. Thus, a customer who does not qualify for this contractual award is entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

AT&TM's legal department generally responds to a notice of dispute with a written settlement offer. *Id.* at 23a. If the dispute is not resolved within 30 days, the customer may invoke the arbitration process by filling out a one-page Demand for Arbitration form (also available on AT&TM's web site) and sending copies to the AAA and to AT&TM. To further assist its customers, AT&TM's web site includes a layperson's guide on how to arbitrate a claim. *Ibid.*

4. The Concepcions' Lawsuit. Customers of most wireless carriers, including AT&TM, typically purchase cell phones and subscribe to wireless service as a bundled transaction, in which the phone is free or steeply discounted in exchange for a commitment to subscribe to service for a specified term (usually one or two years). App., *infra*, 18a-19a.

The respondents, Vincent and Liza Concepcion, are AT&TM customers who filed a putative class action against AT&TM in the United States District Court for the Southern District of California. App., *infra*, 20a. They allege that they entered into a bundled transaction for wireless service and free or heavily discounted phones. *Id.* at 18a-19a. California requires that sales tax be paid on the full retail value of a phone when it is sold as part of a bundled transaction. CAL. CODE REGS. tit. 18, §§ 1585(a)(4), (b)(3). Despite this requirement, the Concepcions allege that when AT&TM charged them sales tax based on the full retail price of phones that were free or discounted, it violated California's unfair competition and false advertising laws (CAL. BUS. & PROF. CODE §§ 17200 *et seq.*; *id.* §§ 17500 *et seq.*) and Consumer Legal Remedies Act (CAL. CIV. CODE §§ 1750 *et seq.*).

App., *infra*, 17a-18a; ER 363-370.[5] They also allege that AT&TM committed fraud and unjustly enriched itself. ER 370-372.

5. Proceedings In The District Court. AT&TM responded to the Concepcions' complaint by moving to compel arbitration. The Concepcions opposed AT&TM's motion, contending principally that AT&TM's arbitration provision is unconscionable under California law because it requires arbitration on an individual (as opposed to class-wide) basis. App., *infra*, 30a-35a. The district court agreed, holding that, despite its pro-consumer features, the provision failed *Discover Bank*'s three-pronged test for such provisions. *Id.* at 35a, 42a-46a.

In applying the first element of this test, the court found that the Concepcions' arbitration agreement was a "contract of adhesion." App., *infra*, 35a. Although the court therefore deemed the agreement to be procedurally unconscionable, it held that the agreement "is on the low end of the spectrum of procedural unconscionability." *Id.* at 36a (internal quotation marks omitted).

The district court next held that the Concepcions could not satisfy the second element of the test—*i.e.*, that "predictably small amounts of damages" are at issue. App., *infra*, 36a-42a. The court explained that, although AT&TM's arbitration provision "does not change the amount of actual damages at issue ($30), it does exponentially change the amount of potential recovery in arbitration." *Id.* at 37a. Because AT&TM has committed to pay all arbitration costs and

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[5] "ER __" refers to the Excerpts of Record in the court of appeals.

makes special premiums available in arbitration, the district court found that the provision "prompts AT&TM to *accept liability*"—and to offer to settle for many times the customer's actual damages—"during the *informal claims process*" that precedes arbitration, "even for claims of questionable merit." *Id.* at 39a (emphasis in original). Indeed, "under the revised arbitration provision, nearly all consumers who pursue the informal claims process are very likely to be compensated promptly and in full." *Id.* at 40a-41a.

"In contrast," the court found, "consumers who are members of a class do not fare as well." *Id.* at 41a. The court cited "studies that show [that] class members rarely receive more than pennies on the dollar for their claims, and that few class members (approximately 1-3%) bother to file a claim when the amount they would receive is small," and noted that the Concepcions "do not dispute these statistics." *Ibid.*

The court observed that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.* at 42a. The court thus concluded that AT&TM's revised arbitration provision "sufficiently incentivizes consumers" to pursue "small dollar" claims (*id.* at 39a) and "is an adequate substitute for class arbitration as to this prong of *Discover Bank*" (*id.* at 42a).

The district court nonetheless held that AT&TM's arbitration provision is unenforceable under California law because AT&TM had not satisfied the third element of the *Discover Bank* test. As the district

court interpreted that aspect of *Discover Bank*, AT&TM was required to demonstrate that "the arbitration provision is an adequate substitute for the deterrent effect of the class action mechanism." App., *infra*, 45a. The court noted that AT&TM had submitted evidence that it dispensed over $1.3 billion in credits in one year to resolve customers' disputes. *Id.* at 44a. But, reversing the ordinary burden of proof in unconscionability challenges, the court held that AT&TM had not shown that its arbitration provision was an adequate substitute for class actions in deterring AT&TM from engaging in wrongdoing of the nature alleged by the Concepcions. *Ibid.*[6] The court proceeded to hold that, although the Concepcions "arguably would be better off" in arbitration, "[f]aithful adherence to California's stated policy of favoring class litigation and [class] arbitration to deter alleged fraudulent conduct * * * compels the Court to invalidate" AT&TM's revised arbitration provision. *Id.* at 46a & n.10.

Finally, the district court rejected AT&TM's argument that "the FAA preempts any holding that AT&TM's arbitration provision is unenforceable under California law." App., *infra*, 46a n.11.

6. The Ninth Circuit's Decision. The Ninth Circuit affirmed, holding that AT&TM's arbitration provision is unconscionable under the California Supreme Court's *Discover Bank* test because it requires customers to arbitrate small consumer claims on an individual basis. App., *infra*, 2a. The panel recog-

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[6] In so holding, the court merely accepted, at face value, the Concepcions' assertion that class actions are necessary for deterrence.

nized that AT&TM's provision "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim." *Id.* at 10a n.9. It thereby effectively acknowledged that requiring the Concepcions to arbitrate under this provision does not shock the conscience. But the panel continued that "the problem with [the provision] under California law—as we read that law—is that not *every* aggrieved customer will file a claim." *Ibid.* (emphasis added).

The panel rejected AT&TM's FAA preemption argument, declaring that its earlier decision in "*Shroyer* [v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007)] controls this case because [AT&TM] makes the same [preemption] arguments we rejected there." App., *infra*, 11a. In *Shroyer*, Judge Reinhardt, joined by Judges Nelson and Rymer, held that the FAA does not preempt the *Discover Bank* rule because, in their view, "class proceedings will [not] reduce the efficiency and expeditiousness of arbitration in general." 498 F.3d at 990. The *Shroyer* court also maintained that the *Discover Bank* rule "is simply a refinement of the unconscionability analysis applicable to contracts generally in California." *Id.* at 987.

The panel further held that this Court's recent decision in *Preston* did not "undercut[] the rationale of *Shroyer*." App., *infra*, 16a.

REASONS FOR GRANTING THE PETITION

In *Southland*, this Court ordered briefing and argument on the question whether, "if State law required" "superimposing class-action procedures on a contract arbitration," the state law "would conflict with the [FAA] and thus violate the Supremacy

Clause." 465 U.S. at 8. The Court ultimately concluded that it could not decide the issue because the appellant "did not contend in the California courts that, and the State courts did not decide whether, State law impos[ing] class action procedures was preempted by federal law." *Ibid.*

Since then, this issue has become "one of the most important—and controversial—issues in modern day class action litigation." Angela C. Zambrano *et al.*, *Wavering Over Consumer Class Actions*, 27 No. 12 BANKING & FIN. SERVS. POL'Y REP. 4, 4 (2008). Literally hundreds of decisions have addressed the enforceability of provisions requiring that arbitration be conducted on an individual basis. Courts applying the laws of 26 States (and the District of Columbia) have held that such provisions are fully enforceable under state law, at least when the arbitration agreement neither imposes high arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration. On the other hand, a few state courts—led by the California Supreme Court—have effectively held that class-action prohibitions in arbitration provisions are categorically unenforceable when the claims are "predictably small." And the Ninth Circuit has determined that such state-law rules "superimposing class-action procedures on a contract arbitration" (*Southland*, 465 U.S. at 8) are not preempted by the FAA. See App., *infra*, 11a-16a; *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1219-1222 (9th Cir.), *cert. denied*, 129 S. Ct. 45 (2008); *Shroyer*, 498 F.3d at 987-991.

This important and frequently recurring issue is fully ripe for resolution. Moreover, this case is a bet-

ter vehicle for resolving the issue than any previous case.[7] Both courts below expressly acknowledged that ATTM's arbitration provision will enable customers to vindicate any claims they may have. See App., *infra*, 10a n.9; *id.* at 42a.[8] Yet both courts also concluded that the arbitration provision is nonetheless unenforceable under California law because it prevents respondents from bringing a class action to

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[7] We are aware that the Court is holding the petition in *American Express Co.* v. *Italian Colors Restaurant*, No. 08-1473, pending its decision in *Stolt-Nielsen S.A.* v. *Animal Feeds International Corp.*, No. 08-1198. That petition raises a somewhat different issue, as the Second Circuit's decision refusing to enforce the requirement that arbitration be conducted on an individual basis was based on federal law, not state law. In any event, that case involved a finding that the respondents could not vindicate their antitrust claims on an individual basis. Here, by contrast, both courts below acknowledged that the Concepcions not only could vindicate their claims on an individual basis, but in fact likely would fare better under ATTM's arbitration provision than as representative plaintiffs in a class action. See pages 12, 14, *supra*.

The present case also is a better vehicle for resolving the preemption issue than *T-Mobile USA, Inc.* v. *Laster*, 128 S. Ct. 2500 (2008), and *T-Mobile USA, Inc.* v. *Lowden*, 129 S. Ct. 45 (2008), in which this Court recently denied certiorari. In both of those cases, the arbitration clause did not allow for recovery of statutory attorneys' fees and accordingly did not provide a realistic means of vindicating small claims on an individual basis.

[8] See also *Makarowski*, 2009 WL 1765661, at *3 (ATTM's arbitration clause "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen"); *Strawn* v. *AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 900 n.6 (S.D. W. Va. 2009) (ATTM's arbitration clause is "unusually consumer-centered"); *Francis* v. *AT&T Mobility LLC*, 2009 WL 416063, at *5 (E.D. Mich. Feb. 18, 2009) (ATTM's clause is "fair" to consumers).

vindicate the rights of others. In other words, both courts held that California's policy favoring class actions trumps the FAA's policy of enforcing private agreements to resolve disputes in a less expensive, less time-consuming, and less adversarial manner than litigation. That holding turns the Supremacy Clause on its head and is impossible to reconcile with this Court's FAA precedents. The time has come to resolve this issue and to put an end to the efforts of California and some other States to exalt their policy preferences for class actions over those of Congress in enacting the FAA.

A. The Case Presents An Exceptionally Important Question As To Which The Lower Courts Are Divided.

There can be little doubt that the issue presented here is an important one. In holding that the FAA does not preempt California's requirement that arbitration provisions allow for class-wide arbitration even when consumers have sufficient incentives to vindicate claims on an individual basis, the Ninth Circuit authorized the invalidation of tens of millions of arbitration contracts in that State. Moreover, the Ninth Circuit's preemption holding applies to contracts governed by the laws of all of the other States in that Circuit, thus permitting invalidation of tens of millions of additional arbitration agreements. To make matters worse, the Ninth Circuit has held in another case that claims by out-of-state customers against California-based companies may be adjudicated under the law of California—even when their contracts call for applying the law of the States in which the customers reside. The upshot is that the Ninth Circuit has permitted California to override the laws of the many other States that have held

that provisions requiring arbitration to take place on an individual basis are enforceable, invalidating tens of millions of additional contracts. Finally, the Ninth Circuit's narrow understanding of FAA preemption, which is at the root of all of these problems, deepens the confusion in the lower courts over when States may refuse to enforce agreements that require arbitration to proceed on an individual basis.

1. The Ninth Circuit's holding that California may refuse to enforce even arbitration provisions like AT&T's, which concededly provide consumers with sufficient incentives to pursue relief on an individual basis, means that no arbitration provision that requires individual arbitration can survive in California. As a result, the Ninth Circuit's decision condemns not just the arbitration provisions in the contracts of some 10 million AT&T customers, but also those in tens of millions of other contracts. Indeed, even before the Ninth Circuit had invalidated AT&T's provision, dozens of federal and state courts applying California law had refused to enforce agreements to arbitrate on an individual basis in the contracts of other wireless carriers, Internet providers, franchisors, computer manufacturers, credit card issuers, mortgage lenders, and major employers.[9]

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[9] See, *e.g.*, *Oestreicher* v. *Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) (computer sales agreement); *Douglas* v. *U.S. Dist. Ct.*, 495 F.3d 1062 (9th Cir. 2007) (long-distance telephone service agreement); *Tijerina* v. *Am. First Real Estate Servs., Inc.*, 2008 WL 4855815 (C.D. Cal. Nov. 6, 2008) (mortgage agreement); *Van Slyke* v. *Capital One Bank*, 503 F. Supp. 2d 1353 (N.D. Cal. 2007) (credit cardholder agreement); *Discover Bank* v. *Super. Ct.*, *supra* (same); *Olvera* v. *El Pollo Loco, Inc.*, 93 Cal. Rptr. 3d 65 (Ct. App. 2009) (employment agreement); *Sanchez* v. *W. Pizza Enters., Inc.*, 90 Cal. Rptr. 3d 818 (Ct. App.
(footnote continued on next page)

And because the Ninth Circuit's erroneous view of FAA preemption is binding throughout that Circuit, that means that eight other States are free to impose blanket bans on agreements to arbitrate on an individual basis. That concern is real: The Ninth Circuit already has expressed the view that Washington law tracks California law on the enforceability of arbitration provisions that preclude class-wide arbitration. See *Lowden*, 512 F.3d at 1218-1219. More troubling still, the Ninth Circuit recently held that California law governs the enforceability of such provisions in the contracts of customers of California-based businesses *even when those contracts choose the law of the customer's home state*. *Masters* v. *DirecTV, Inc.*, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009).

Taken together, the decision below and *Masters* mean that no arbitration provision between a California-based company and its customers throughout the country is enforceable unless it allows for class-wide arbitration. Thus, not only has California (with an assist from the Ninth Circuit) thwarted the policies of the FAA, but it also has trumped the law of the 25 States (and the District of Columbia) that deem contracts prohibiting class-wide arbitration to be enforceable so long as the customer is able to vin-

2009) (same); *Murphy* v. *Check 'N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120 (Ct. App. 2007) (same); *Gatton* v. *T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Ct. App. 2007) (wireless service agreement); *Cohen* v. *DirecTV, Inc.*, 48 Cal. Rptr. 3d 813 (Ct. App. 2006) (satellite television service agreement); *Klussman* v. *Cross Country Bank*, 36 Cal. Rptr. 3d 728 (Ct. App. 2005) (credit cardholder agreement); *Aral* v. *EarthLink, Inc.*, 36 Cal. Rptr. 3d 229 (Ct. App. 2005) (Internet provider service agreement); *Indep. Ass'n of Mailbox Ctr. Owners, Inc.* v. *Super. Ct.*, 34 Cal. Rptr. 3d 659 (Ct. App. 2005) (franchise agreement).

dicate his or her own rights in individual arbitration. See Appendix D, *infra*. Review is essential now to reaffirm that the FAA precludes States from superimposing procedures on arbitration that are not necessary to ensure that the parties to the arbitration can vindicate their claims.

2. The Court's intervention is warranted for the additional reason that the lower courts are in disarray as to whether and, if so, when, the FAA preempts state-law limitations on class waivers in arbitration provisions.

To begin with, the decision below conflicts with the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007). The *Gay* court held that the FAA preempts Pennsylvania's rule that provisions waiving the right to bring a class action are unconscionable. *Id.* at 392-395. It explained that "whatever the benefits of class actions, the FAA *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. To the extent, then, that [Pennsylvania cases] hold that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract," they are preempted by Section 2 of the FAA. *Id.* at 394 (citations, alterations, and internal quotation marks omitted; emphasis in original).

To be sure, a subsequent panel of the Third Circuit has distinguished this holding (erroneously, we believe) on the ground that Pennsylvania's rule is limited to arbitration provisions in violation of Section 2 of the FAA, and then held that New Jersey law is not preempted because it applies equally to arbitration provisions and contracts that bar judicial class actions. See *Homa* v. *American Express Co.*,

558 F.3d 225, 229-230 (3d Cir. 2009). Nevertheless, there is little reason to believe that the Third Circuit would jettison *Gay* entirely the next time a case governed by Pennsylvania law is before it. And there is not much likelihood of that happening any time soon anyway, because, whenever the defendant does business nationally, savvy plaintiffs' lawyers will avoid the risk by filing suit in a federal court within the Ninth Circuit, where *Gay* has no force and the preemption ruling in this case governs.

The Ninth Circuit's holding also squarely conflicts with the holding of the Tennessee Court of Appeals that the "Supremacy Clause * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action." *Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001). Because the Tennessee Supreme Court denied the plaintiff's petition for review in *Pyburn* and ordered the court of appeals' decision published (*id.* at 351), "the bench and bar of [Tennessee]" may rely upon that decision "as representing the present state of the law with the same confidence and reliability as the published opinions of the [Tennessee Supreme] Court." *Meadows* v. *State*, 849 S.W.2d 748, 752 (Tenn. 1993).

Moreover, the development of a more pronounced disagreement among the lower courts is highly unlikely. Courts generally would have no need to reach the FAA preemption issue unless they first were to conclude that the applicable state law would bar enforcement of the arbitration provision. But 25 States and the District of Columbia already have held that provisions that require arbitration to be conducted on an individual basis are enforceable so long as ar-

bitration is free or inexpensive and individual remedies (including statutory fee-shifting awards) are not limited, so a preemption ruling is unlikely in cases governed by the law of those States.[10]

Nine of the remaining 25 States are in the Ninth Circuit, where the holding in the present case is binding for all cases brought in federal court or removed under the Class Action Fairness Act, 28 U.S.C. § 1332(d). In addition, consumer class actions are rare in nine of the 16 other States.[11] It therefore

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[10] These cases are collected in Appendix D to this Petition. See App., *infra*, 63a-69a. Among these cases are two from federal courts of appeals that, though deciding the issue under State unconscionability law, went on to explain that provisions requiring arbitration to be conducted on an individual basis are consistent with the goals of the FAA. See *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (holding that an agreement to arbitrate on an individual basis was not unconscionable under Georgia law and explaining that a prohibition of class arbitration is "consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court in *Gilmer*") (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)); *Iberia Credit Bureau*, 379 F.3d at 174 (holding that an early version of ATTM's arbitration provision was not unconscionable under Louisiana law merely because it required individual arbitration and explaining that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims") (quoting *Gilmer*, 500 U.S. at 31).

[11] States in this category include Indiana, Iowa, Kentucky, Maine, Minnesota, Nebraska, New Hampshire, Rhode Island, and Wyoming. A recent study of decisions involving state consumer-protection statutes found that, in 2007, these nine States combined to account for only approximately 5% of such decisions nationwide. See Searle Civil Justice Institute, *State Con-*

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is not clear when—if ever—a court applying the law of one of these States would confront the FAA preemption issue. That is especially true given the ability of class-action plaintiffs to bring claims within the Ninth Circuit against virtually any company doing business on a nationwide basis.[12]

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sumer Protection Acts: An Empirical Investigation of Private Litigation Preliminary Report 25 tbl. 1 (Dec. 2009), *at* http://www.law.northwestern.edu/searlecenter/uploads/CPA_Proof_113009_final.pdf. By contrast, California alone accounted for over 22 percent. See *ibid.* Indeed, even though it is broadly acknowledged that the enforceability of class-action waivers in arbitration agreements is the most significant unresolved issue in consumer litigation (see page 24 & note 13, *infra*), there are still no appellate cases addressing this issue under the law of eight of these nine States. The issue is currently pending before the Kentucky Supreme Court. See *Schnuerle* v. *Insight Commc'ns Co.*, No. 2008-SC-000789 (Ky.).

[12] The remaining seven States are Florida, Massachusetts, New Jersey, New Mexico, North Carolina, Pennsylvania, and Wisconsin. As noted above, the Third Circuit has opined that Pennsylvania law barring provisions that require individual arbitration is preempted. The Eleventh Circuit recently certified to the Florida Supreme Court the question whether a requirement that disputes be arbitrated on an individual basis in Sprint's service agreements with its customers either is unconscionable under Florida law or violates Florida's public policy. See *Pendergast v. Sprint Nextel Corp.*, __ F.3d __, 2010 WL 6745 (11th Cir. Jan. 4, 2010). Until the Eleventh Circuit did so, the law had appeared clear that ATTM's arbitration is enforceable under Florida law. See *Cruz* v. *Cingular Wireless, LLC*, 2008 WL 4279690, at *4 (M.D. Fla. Sept. 15, 2008) (rejecting argument that requirement that disputes be arbitrated on an individual basis in ATTM's arbitration provision violates Florida public policy), *appeal pending*, No. 08-16080-C (11th Cir.); *Fonte* v. *AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025-1026 (Fla. Dist. Ct. App. 2005) (requirement that disputes be arbitrated on an individual basis in arbitration provision of one of

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This Court granted certiorari in *Preston* in the absence of any conflict among the lower courts. That case involved a limited, industry-specific incursion on the FAA's policy mandating the enforcement of arbitration agreements. See *Preston*, 128 S. Ct. at 981 (arbitration of disputes between entertainers and talent agencies).

Here, by contrast, there is broad agreement that "the enforceability of an express class action waiver in a consumer arbitration agreement" is "[o]ne of the most important arbitration questions that has yet to be definitively resolved by the U.S. Supreme Court." Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775, 775 (2005). Prominent members of the plaintiffs' bar describe it as "one of the most hotly contested issues in all of consumer and employee litigation." F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 393 (2009).[13]

AT&TM's predecessors neither is unconscionable nor violates Florida's public policy).

[13] See also, *e.g.*, Zambrano *et al.*, *supra*, 27 No. 12 BANKING & FIN. SERVS. POL'Y REP. at 4 ("the enforceability of class action waivers has become one of the most important—and controversial—issues in modern day class action litigation"); Erin Holmes, *Ross v. Bank of America*, 24 OHIO ST. J. DISP. RESOL. 387, 387-388 (2009) (enforceability of agreements to arbitrate on an individual basis is "an important issue in consumer litigation"); Marc J. Goldstein, *The Federal Arbitration Act and Class Waivers in Consumer Contracts: Are These Waivers Unenforceable?*, 63 DISP. RESOL. J. 55, 55-56 (2008) (enforceability of such agreements is "[o]ne of the most important issues facing" companies); Kathleen M. Scanlon, *Class Arbitration Waivers:*

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The fact that the present case affects a far broader cross-section of the economy is further reason to grant review now rather than waiting years for the possibility that the existing split will materially deepen.

B. Review Is Warranted Because The Decision Below Conflicts With The FAA And This Court's Precedents.

The Ninth Circuit's holding that the FAA does not preempt California's public policy prohibiting parties from agreeing to arbitrate disputes on an individual basis is irreconcilable with three different strands of this Court's FAA jurisprudence.

First, this Court's decisions establish that the entire point of the FAA is to enable parties to contract out of the procedural accoutrements of litigation and to tailor the features of arbitration, especially the procedures, to their needs. These cases reject the Ninth Circuit's view that the States are free to impose whatever procedures they want and for whatever reason, so long as those procedures are equally applicable in litigation.

Second, this Court's decisions further establish that Section 2's savings clause applies only to generally applicable principles of state contract law. Here, in holding that arbitration agreements that preclude class actions are unconscionable even when they ensure that the parties can vindicate their claims on an individual basis, the Ninth Circuit severely distorted

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The "Severability" Doctrine and Its Consequences, 62 DISP. RESOL. J. 40, 44 (2007) (enforceability of such agreements is "an extremely important issue in the consumer and employment contexts").

generally applicable unconscionability principles to create a new rule that is applicable only to dispute-resolution provisions (virtually all of which are arbitration provisions). In so doing, the court below ran afoul of Section 2.

Third, this Court has emphasized repeatedly that the FAA embodies a powerful federal policy favoring arbitration as a means of dispute resolution. By holding that the States are free to condition enforcement of arbitration provisions on the availability of class-wide arbitration, the Ninth Circuit has endorsed the functional equivalent of a ban on consumer arbitration provisions. That is because class arbitration eliminates all of the benefits of traditional, individual arbitration, while multiplying the risks exponentially. Businesses will give up on arbitration entirely rather than accept that lose-lose proposition. Needless to say, a state rule that would lead to the wholesale abandonment of arbitration conflicts with the purposes of the FAA and cannot be permitted to stand.

1. This Court has stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trustees*, 489 U.S. 468, 479 (1989); see also *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 453 (2003) (plurality op.); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995). To accomplish that end, Section 2 of the FAA provides that "written" arbitration agreements in contracts "evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

Section 2 of the FAA does contain an exception: It authorizes courts to decline to enforce arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract," which the Court has interpreted to include such "generally applicable contract defenses" as "fraud, duress, or unconscionability." *Casarotto*, 517 U.S. at 686-687. But that exception is necessarily a narrow one.

This Court has never held or even hinted that a state policy favoring a particular procedural device could come within Section 2's savings clause so long as that policy applies to both litigation and arbitration. To the contrary, the Court has squarely held that, under the FAA, "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract *the rules under which that arbitration will be conducted*." *Volt*, 489 U.S. at 479 (citation omitted; emphasis added). The Court has specifically identified "procedure" as one of the "features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

Indeed, the whole point of entering into an arbitration agreement is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, just last Term the Court reiterated that "the recognition that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select

arbitration." *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1471 (2009) (emphasis added).

Precisely because the entire purpose of arbitration is to provide a less expensive, less time-consuming, and less adversarial alternative to litigation, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve" federal statutory claims. *Ibid.* Rather, "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," there is no basis for refusing to enforce his or her arbitration agreement according to its terms. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (internal quotation marks omitted; second alteration in original). That is so even if "the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Id.* at 32 (internal quotation marks omitted).

The holding below—that Section 2's savings clause authorizes California to condition enforcement of arbitration provisions on the availability of the class-action device *even when a class action is not necessary to vindicate the plaintiff's claims*—is irreconcilable with these precedents.

The Ninth Circuit was of the view that the FAA allows States to impose whatever procedures they want—for whatever policy reasons they want—so long as the procedures apply equally to cases in court and cases in arbitration. But that narrow reading of the FAA's preemptive force is foreclosed by this Court's recent decision in *Preston*. That case involved a provision of the California Talent Agents Act ("TAA") that required disputes under that Act to be submitted to California's Labor Commissioner in

the first instance—prior to either litigation or arbitration.[14]

Noting that "[t]he FAA's displacement of conflicting state law is now 'well-established,'" the Court held that "the FAA supersedes" the California statute. *Preston*, 128 S. Ct. at 983, 987 (quoting *Allied-Bruce*, 513 U.S. at 272). As the Court observed, "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 986 (quoting *Mitsubishi Motors*, 473 U.S. at 633). That objective "would be frustrated" by the TAA, the Court explained, because "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." *Ibid.*

Here, as in *Preston* (and *Southland*), California has insisted on superimposing its own preferred procedures on a contractual arbitration. In *Preston*, the respondent contended that enforcing his arbitration agreement without the overlay of the TAA's exhaustion requirement "would undermine the Labor Commissioner's ability to stay informed of potentially illegal activity * * * and would deprive artists protected by the TAA of the Labor Commissioner's ex-

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[14] The TAA did contain an exemption to this exhaustion requirement for arbitration agreements between talent agents and their customers if the agreements provided for notice to the Labor Commissioner and an opportunity to attend the hearing. But the Court found this exemption to be "of no utility" to the petitioner, who "would have been required to concede a point fatal to his claim for compensation—*i.e.*, that he is a talent agent, albeit an unlicensed one—and to have drafted his contract in compliance with a statute that he maintains is inapplicable." *Preston*, 128 S. Ct. at 985.

pertise." 128 S. Ct. at 986. This time the proffered rationale is that the agreement to arbitrate on an individual basis interferes with the state policy of using class actions to "deter" corporate misconduct. But as in *Preston*, a state policy that has nothing to do with whether the parties to the dispute can effectively resolve that dispute through arbitration is not a valid basis for adding procedural layers to which the parties did not agree.

Indeed, if the rule were otherwise the States' ability to superimpose procedures on arbitration would not end with class actions—or with the consumer context. For example, a State just as easily could assert that the use of arbitration hinders parties situated similarly to the plaintiff from learning of infringements of their legal rights. It accordingly could condition enforcement of arbitration agreements on the requirement that the arbitration decision be published. The scope of the procedures that States could impose on arbitration would be limited only by their imagination, as it is always possible to identify a policy basis for any preferred procedure. In the end, arbitration would be converted into litigation, and the FAA would be rendered a nullity. See *Iberia Credit Bureau*, 379 F.3d at 175-176 ("[T]he plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself. If every arbitration were required to produce a publicly available, 'precedential' decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding.").

2. The Ninth Circuit's decision—and the California cases it purports to apply—also run headlong into this Court's precedents holding that Section 2 of the FAA prohibits courts from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 128 S. Ct. at 985; see also *Perry*, 482 U.S. at 492 n.9. As noted above, under generally applicable California law, a contractual term must shock the conscience in order to be substantively unconscionable. Moreover, if the degree of procedural unconscionability is low, the degree of substantive unconscionability must be high for the term to be deemed unenforceable. See pages 5-6, *supra*.

An arbitration provision that "a reasonable consumer may well prefer" (App., *infra*, 42a) cannot legitimately be said to be conscience shocking. And it certainly is not so extremely conscience shocking as to make up for it being "on the low end of the spectrum of procedural unconscionability," as the district court found AT&TM's arbitration provision to be. *Id.* at 36a.

Thus, it is only by applying a version of unconscionability law that is "not applicable to contracts generally" (*Preston*, 128 S. Ct. at 985), but instead is aimed directly at agreements to resolve disputes, that the courts below could deem AT&TM's arbitration provision unenforceable. If allowed to stand, California's distortion of unconscionability doctrine in the context of agreements to arbitrate on an individual basis would enable Section 2's exception to swallow its rule, as States could deem "unconscionable" any arbitration clause that fails to provide for particular favored procedures (such as trials by jury,

plenary discovery, motion practice, or written rulings).

3. Finally, this Court has recognized that the FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural* policies to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). The California rule favoring class actions above all else irreconcilably conflicts with the FAA's command that arbitration agreements "shall be valid, irrevocable, and enforceable" (9 U.S.C. § 2) and the federal policy favoring arbitration because businesses will give up on arbitration altogether rather than subject themselves to the risk of a class arbitration.

To begin with, class arbitration involves the same massive stakes as a judicial class action and is every bit as burdensome, expensive, and time-consuming—if not more so.[15] Indeed, class arbitration is the quintessential example of arbitration "mutat[ing] into a private judicial system that looks and costs like the litigation it's supposed to prevent." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV. 120, 120 (May 1994).

At the same time, class arbitration fails to provide many of the key protections offered to defen-

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[15] Class arbitration may *add* procedural complexity. For example, the AAA's class arbitration procedures largely duplicate the Federal Rules of Civil Procedure—with the exception that they provide that, once the arbitrator issues a "class determination award," the parties may move to vacate or confirm that interim award in the district court. See generally AAA, *Policy on Class Arbitrations*, *at* http://www.adr.org/Classarbitrationpolicy.

dants litigating a class action in court. For one thing, unlike in court, where appellate review of class-certification and merits determinations is robust, the standard for vacating an arbitrator's decision on such issues is "among the narrowest known to law." *Dominion Video Satellite, Inc.* v. *Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Consistent with the "national policy favoring arbitration," the FAA provides only "the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St. Assocs.*, 128 S. Ct. at 1405. Accordingly, an arbitrator's errors regarding class certification, the scope of any class, the admissibility of expert testimony or other important evidence, whether or not the claim was proven, and the amount of damages can rarely, if ever, be disturbed by a court. Moreover, even if the business wins a class-wide arbitration, it can have no assurance of finality because absent class members may contend that they were not afforded the due process protections necessary to make a class-wide award binding on them. Because arbitrators designated by contracts between private parties are not bound by the U.S. Constitution's due process clauses (see Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 187 n.5 (2006) (citing cases)), courts may well embrace such an argument. See also Edward K.M. Bilich, *Consumer Arbitration: A Class Action Panacea*, 7 CLASS ACTION LITIG. REP. (BNA) 768, 771 (2006) (noting that because of the "deferential standard of review" of arbitrators' decisions there is "no assurance that the 'class' arbitration proceedings would be binding on absent class members").

Given the risks entailed in *class* arbitration and the absence of any offsetting benefits, no reasonable

defendant would willingly subject itself to this worst-of-both-worlds scenario. Indeed, in response to prior decisions of the Ninth Circuit refusing to find California's policy favoring class actions preempted by the FAA, the nation's largest cable company, Comcast Corp., has already abandoned arbitration in California.[16] Accordingly, California's rule conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration is in all practical sense a ban on consumer arbitration agreements. As such, California's rule—and the Ninth Circuit's rejection of ATTM's preemption challenge to that rule—cannot be reconciled with the FAA's policy of promoting arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[16] See Comcast Agreement for Residential Services § 13.k, *at* http://www.comcast.net/terms/subscriber/ ("IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE.").

Respectfully submitted.

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APPENDICES

APPENDIX A

United States Court of Appeals,

Ninth Circuit.

Jennifer L. LASTER; Andrew Thompson; Elizabeth Voorhies, on behalf of themselves and all others similarly situated and on behalf of the general public, Plaintiffs,

and

Vincent Concepcion; Liza Concepcion, Plaintiffs-Appellees,

v.

AT & T MOBILITY LLC, Defendant-Appellant.

No. 08-56394.

Argued and Submitted Sept. 17, 2009.
Filed Oct. 27, 2009.

Before: MARY M. SCHROEDER, STEPHEN REINHARDT and CARLOS T. BEA, Circuit Judges.

BEA, Circuit Judge:

This case involves a class action claim that a telephone company's offer of a "free" phone to anyone who signs up for its service is fraudulent to the extent the phone company charges the new subscriber sales tax on the retail value of each "free" phone.

The phone company demanded the plaintiffs' claims be submitted to individual arbitration, pointing to the arbitration clause of the written agreement, which arbitration clause requires arbitration, but bars class actions. Because this is an action in-

voking diversity of citizenship jurisdiction, the plaintiff-subscribers point to California contract law, which they claim renders both the arbitration clause and the class action waiver unconscionable, hence, unenforceable.

At first blush, it seems we decided the invalidity of an arbitration agreement banning class actions in *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976(9th Cir. 2007). But, the phone company points to a new wrinkle: unlike the arbitration clause in Shroyer, this arbitration clause provides for a "premium" payment of $7,500 (the jurisdictional limit of California's small claims court) if the arbitrator awards the customer an amount greater than the phone company's last written settlement offer made before selection of an arbitrator. Hence, says the phone company, the arbitration clause is not an artifice that has the practical effect of rendering it immune from individual claims.

We will find, on second blush, the new "premium" payment does not distinguish this case from *Shroyer*, and that under California law, the present arbitration clause is unconscionable and unenforceable. Further, we will also find no merit to the phone company's claim the Federal Arbitration Act (FAA) preempts California unconscionability law.

Thus, we will affirm the district court's order.

I. Factual and Procedural History

In February 2002, Vincent and Liza Concepcion signed a Wireless Service Agreement (WSA) with

AT & T Mobility[1] (AT & T) for cellular phone service and the purchase of new cell phones. The Concepcions received the cell phones without charge for the devices themselves because they agreed to a two-year contract term. However, AT & T charged them $30.22 total in sales tax for the two phones,[2] calculated as 7.75% of both phones' full retail value. The Concepcions continued to renew their WSA through the filing of this lawsuit.

The WSA included both an arbitration clause, which required any disputes to be submitted to arbitration, and a class action waiver clause, which required any dispute between the parties to be brought in an individual capacity. In December 2006, AT & T revised the arbitration agreement to add a new premium payment clause. Under this clause, AT & T will pay a customer $7,500[3] if the arbitrator issues an award in favor of a California customer that is

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[1] The original contract was with Cingular Wireless. In November of 2005, AT & T acquired Cingular Wireless and renamed the company AT & T Mobility (AT & T) on January 8, 2007.

[2] The Concepcions allege they were actually charged $149.99 for a Motorola phone, and $0.00 for a Nokia phone. If so, at a sales tax rate of 7.75%, the amount of sales tax charged on the "free" Nokia phone is but $18.60. For purposes of the present appeal, the disparity in their pleadings is inconsequential. If anything, it makes the predictable recovery in an individual claim smaller and more likely to have the practical effect of making the arbitration clause unconscionable.

[3] The agreement specifically provides for a premium payment in the amount of "the maximum claim that may be brought in small claims court in the county of your billing address." In California, the maximum claim is $7,500. Cal. Code Civ. Proc. § 116.221.

greater than AT & T's last written settlement offer made before the arbitrator was selected.

On March 27, 2006, before the premium payment clause was added, the Concepcions filed a complaint in the United States District Court for the Southern District of California. The Concepcions alleged the practice of charging sales tax on a cell phone advertised as "free" was fraudulent. In September 2006, the district court consolidated the Concepcions' case with the *Laster* case, a putative class action addressing the same issues. In March 2008, after the premium payment clause was added, AT & T filed a motion to compel the Concepcion plaintiffs to submit their claims to individual arbitration under the revised arbitration agreement. The district court denied the motion. It held that the class waiver provision of the arbitration agreement is unconscionable under California law and that California unconscionability law is not preempted by the Federal Arbitration Act. AT & T timely appealed.

II. Jurisdiction and Standard of Review

This is an interlocutory appeal from the denial of a motion to compel arbitration. We have jurisdiction under 9 U.S.C. § 16(a)(1)(B). We review the denial of a motion to compel arbitration de novo. *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 981 (9th Cir. 2007).

III. Discussion

A. AT & T's class action waiver is unconscionable under California law.

The district court did not err when it held AT & T's class action waiver was unconscionable under California law, and thus unenforceable. Under

the Federal Arbitration Act, arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable." *Shroyer*, 498 F.3d at 981 (internal citations omitted).

To be unenforceable under California law, a contract provision must be both procedurally and substantively unconscionable. *Id.* at 981. Procedural unconscionability generally takes the form of a contract of adhesion, that is, a contract drafted by the party of superior bargaining strength and imposed on the other, without the opportunity to negotiate the terms. *Id.* at 982. Substantive unconscionability focuses on overly harsh or one-sided contract terms. *Id.* Both elements of unconscionability need not be present to the same degree; California courts use a sliding-scale: the more substantively unconscionable the contract term, the less procedurally unconscionable it need be to be unenforceable and vice versa. *Id.* at 981-82.

The California Supreme Court addressed the unconscionability of class action waivers in arbitration agreements for the first time in *Discover Bank v. Sup. Ct.*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005), holding that class action waivers were at least sometimes unconscionable under California law. 30 Cal. Rptr. 3d 76, 113 P.3d at 1108. Class actions, the court reasoned, serve the important policy function of deterring and redressing wrongdoing, particularly where a company defrauds

large numbers of consumers out of individually small sums of money.[4] *Id.* at 1105. Class action waivers pose a problem because, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* at 1106. In this way, the class action waiver allows the company to insulate itself from liability for its wrongdoing and the policy behind class actions is thwarted. *Id.* at 1109. With this in mind, the *Discover Bank* court held:

> when the [class] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least . . . the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

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[4] As the California Supreme Court has emphasized, "Some courts have viewed class actions or arbitrations as a merely procedural right, the waiver of which is not unconscionable. . . . But as [the cases] of this court have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights." *Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1109.

Id. at 1110 (internal quotations omitted). The reasoning behind this rule is pretty easy to grasp. As we explained in *Shroyer*: "when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers." 498 F.3d at 986.

We have interpreted *Discover Bank* as creating a three-part test to determine whether a class action waiver in a consumer contract is unconscionable: (1) is the agreement a contract of adhesion; (2) are disputes between the contracting parties likely to involve small amounts of damages; and (3) is it alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money. *Id.* at 983. In *Shroyer*, we noted that "there are most certainly circumstances in which a class action waiver is unconscionable under California law despite the fact that all three parts of the *Discover Bank* test are not satisfied." *Id.* Because we hold that the class action waiver at issue satisfies all three parts of the test, as was true in *Shroyer*, "it is unnecessary to explore those circumstances here." *Id.*

1. *AT & T's class action waiver is unconscionable under the three-part Discover Bank test.*

    a. AT & T's WSA is a contract of adhesion.

As we noted in *Shroyer*, a contract of adhesion under California law is a standardized contract imposed on the subscribing party without an opportunity to negotiate the terms. *Id.* The Concepcions were

given the standardized WSA without the opportunity to negotiate the terms. Thus, under California law, it is a contract of adhesion.

b. The dispute involves predictably small amounts of damages.

In both *Shroyer* and *Discover Bank* the damages at issue were found to be "predictably small." The plaintiffs in *Shroyer* sued under cell phone contracts, claiming damages in the "hundreds of dollars" range based on the cost of obtaining new cell phone service with other companies. 498 F.3d at 984. In *Discover Bank*, the plaintiff sought to recover a $29 fee charged for late credit card payments that were claimed not to be late. 30 Cal. Rptr. 3d 76, 113 P.3d at 1104. Each court determined that these amounts were small enough to satisfy the second prong of the *Discover Bank* test. *See Shroyer*, 498 F.3d at 984; *Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1110. Here, the damages are $30.22[5] for the sales tax charged on cell phones AT & T advertised were "free." This is comparable to the amount of damages in *Discover Bank*, and well below the hundreds of dollars found predictably small in *Shroyer*.

c. The Concepcions alleged AT & T carried out a scheme deliberately to cheat large numbers of consumers out of small sums of money.

The Concepcions alleged in their complaint that AT & T was fraudulently advertising the phones were free, all the while knowing AT & T would charge consumers sales tax on such phones. This is

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[5] *Or* $18.60, *see supra note* 2.

sufficient to satisfy the third-prong of *Discover Bank*. *See id.* at 984, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

d. Conclusion

Because all three prongs of the *Discover Bank* test are met, AT & T's class action waiver is unconscionable under California law.

2. *AT & T's premium payment provision does not negate the unconscionability of the class action waiver under California law.*

AT & T contends the premium payment provision of its revised arbitration agreement[6] prevents the class action waiver from being substantively unconscionable. AT & T reasons that the potential for the premium payment overcomes the problem of predictably small damages identified in *Discover Bank* and *Shroyer*. AT & T submits an award of $7,500 should provide individual customers an adequate incentive to pursue initially small damage claims with higher potential, against the company. AT & T contends that this incentive-laden scheme actually punishes it should it make low-ball offers in settlement, and it removes any claim of immunity from liability for its allegedly fraudulent conduct; therefore *this* class waiver is not unconscionable. However, this is incorrect. The *Discover Bank* rule focuses on whether damages are predictably small, and in the end, the

[6] The provision provides for a contractual payment of $7,500 if a customer receives an arbitration award greater than the amount of AT & T's last written settlement offer, made before an arbitrator was chosen.

premium payment provision does not transform a $30.22 case into a predictable $7,500 case.

The $7,500 premium payment is available only if AT & T does not make a settlement offer to the aggrieved customer in a sum equal to or higher than is ultimately awarded in arbitration, and before an arbitrator is selected. This means that if a customer files for arbitration[7] against AT & T, predictably, AT & T will simply pay the face value of the claim before the selection of an arbitrator to avoid potentially paying $7,500. Thus, the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22.[8] We held in *Shroyer* that a claim worth a few hundred dollars did not provide adequate incentive for a customer to bother pursuing individual arbitration. 498 F.3d at 986. The $30.22 at issue here is even less of an incentive to file a claim. As a result, aggrieved customers will predictably not file claims-even if the odds are that after the letter-

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[7] AT & T puts much stock in the argument that, while a customer might not be bothered to arbitrate or litigate small damage claims, a customer would be willing to pursue a small damage claim through AT & T's informal claims process. However, were this the case it would not affect the outcome. We must determine only whether the premium provides adequate incentive to pursue individual *arbitration*, not informal resolution. *See Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1110 ("[n]or do we agree . . . that small claims litigation, government prosecution, or *informal resolution* are adequate substitutes [for the class action mechanism].") (emphasis added).

[8] The problem with small damage claims is not that the monetary cost of arbitrating is greater than the potential recovery, but that a person normally will not find it worth the time or the hassle to try to recover such a small amount, even if that person spends no money to hire an attorney or to invoke the arbitration process. *See Shroyer*, 498 F.3d at 986.

writing and arbitrator-choosing, they will get a $30.22 offer-thereby "greatly reduc[ing] the aggregate liability" AT & T faces for allegedly mulcting small sums of money from many consumers. *See id.* The premium payment provision has no effect on this conclusion,[9] nor do any of the other provisions of AT & T's revised arbitration clause.[10] The actual damages a customer will recover remain predictably small, thus under the rationale of *Discover Bank* and *Shroyer*, AT & T's class action waiver is in effect an exculpatory clause, hence substantively unconscionable.

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[9] The provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim. Although this is, in and of itself, a good thing, the problem with it under California law-as we read that law-is that not every aggrieved customer will file a claim.

[10] In addition to the $7,500 premium payment, the revised arbitration agreement also provides: double attorney's fees in the event the arbitrator awards the customer more than AT & T's last written settlement offer before the arbitrator was selected; AT & T will pay all arbitration costs and fees unless the arbitrator determines that the claim was frivolous or brought for an improper purpose; AT & T will not seek attorney's fees if it prevails; either party may bring a claim in small claims court; the arbitration is not confidential; full court remedies, including punitive damages and injunctions, are available; arbitration will be conducted pursuant to AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, the arbitration will take place in the county of the customer's billing address, and that the customer can choose between an in-person, telephonic, or no hearing at all for claims of less than $10,000.

B. The Federal Arbitration Act does not preempt California unconscionability law.

The Federal Arbitration Act does not expressly or impliedly preempt California law governing the unconscionability of class action waivers in consumer contracts of adhesion. The FAA "does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause." *Shroyer*, 498 F.3d at 987. *Shroyer* controls this case because AT & T makes the same arguments we rejected there.

1. The FAA does not expressly preempt California law.

The FAA provides that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, if a state-law ground to revoke an arbitration clause is not also applicable as a defense to revoke a contract in general, that state-law principle is preempted by the FAA. *Shroyer*, 498 F.3d at 987. However, "because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA." *Id.* at 988 (internal quotations omitted).

AT & T contends the *Discover Bank* rule abandons the sliding-scale approach of California general unconscionability law and is therefore a "new rule" applicable only to arbitration agreements. This contention is incorrect. As we explained in *Shroyer*, "[t]he rule announced in *Discover Bank* is simply a refinement of the unconscionability analysis applica-

ble to contracts generally in California." 498 F.3d at 987. Essentially, the *Discover Bank* test applies the general sliding-scale approach to unconscionability in the specific context of class action waivers. The best way to read *Discover Bank* in light of the sliding-scale approach is that, if a contract clause is, in practice, exculpatory, as long as there is any degree of procedural unconscionability, the element of substantive unconscionability is generally adequate, as a matter of law. *See Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1109 (holding that exculpatory clauses are substantively unconscionable, and when contained in procedurally unconscionable adhesive contracts, "generally unconscionable").

Moreover, in *Shroyer*, we already rejected the argument that *Discover Bank* subjects "arbitration clauses to special scrutiny." *Id.* at 987, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. AT & T is making the same preemption arguments already rejected in *Shroyer*. As a panel, we are bound by a prior panel's determination of law. *General Const. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005). *Shroyer* controls, therefore California law is not expressly preempted by the FAA.

2. The FAA does not impliedly preempt California law.

Neither does the FAA impliedly preempt California unconscionability law. A state law is impliedly preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Shroyer*, 498 F.3d at 988. Determining whether California's unconscionability principles stand as an obstacle to the FAA first requires identification of the purposes and objectives underlying the federal Act. *Id.* at 988-89. In *Shroyer*,

we identified two purposes: first, to reverse judicial hostility to arbitration agreements by placing them on the same footing as any other contract, and second, to promote the efficient and expeditious resolution of claims. *Id.* at 989.

In *Shroyer*, we held that California unconscionability law did not stand in the way of either of these identified purposes. *Id.* at 989-91. As to "reversing hostility to arbitration and placing arbitration agreements on the *same footing* as ordinary contracts," this is not "frustrated or undermined in any way by a holding that class arbitration waivers in contracts of adhesion, like class action waivers in such contracts are unconscionable." *Id.* at 990. Rather, "*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration." *Id.* We further explained, "the fact that § 2 expressly permits a court to decline enforcement of an arbitration agreement on grounds . . . such as unconscionability, strongly suggests that Congress did not contemplate that implied preemption principles would be applied to mandate the opposite result." *Id.* at 989-90.

As to the second purpose identified, we rejected the "contention that class proceedings will reduce the efficiency and expeditiousness of arbitration in general." *Id.* at 990. For these reasons, we held that "applying California's generally applicable contract law to refuse enforcement of the unconscionable class action waiver in this case does not stand as an obstacle to the purposes or objectives of the Federal Arbitration Act, and is, therefore, not impliedly preempted." *Id.* at 993.

Here, AT & T makes the same arguments regarding conflict preemption that we rejected in *Shroyer*. *Compare* Opening Br. at 51-53 (arguing that class proceedings would hinder a speedy resolution, place extra burdens on the arbitral process, and lead to companies abandoning arbitration altogether) *with Shroyer*, 498 F.3d at 989 (noting that appellant argued class proceedings would hinder the "speed, simplicity, cost savings, informality, and reduced adversariality" of arbitration and lead to companies abandoning arbitration). AT & T even admits the court in *Shroyer* "rejected a similar argument." Opening Br. at 49. However, AT & T attempts to distinguish this case from *Shroyer* by contending that a recent Supreme Court case, *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008), supercedes *Shroyer*'s reasoning on this point.

Preston, an attorney, performed services for Ferrer regarding Ferrer's role as "Judge Alex" on a Fox television network program. 128 S. Ct. at 982. Preston filed an arbitration demand seeking fees allegedly owed him by Ferrer under their contract. *Id.* Ferrer responded by petitioning the California Labor Commissioner to declare the entire contract invalid under the California Talent Agencies Act (TAA). *Id.* Ferrer contended that Preston was acting as a talent agent without the license required by the TAA, thus rendering their entire contract void. *Id.*

Preston responded by filing a motion to compel arbitration. *Id.* The trial court denied the motion to compel arbitration, and the denial was affirmed on appeal, on the ground the TAA vested primary exclusive jurisdiction in the California Labor Commissioner to determine who was or was not a talent agent. *Id.* The U.S. Supreme Court granted certiorari

and reversed, noting that *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) "largely, if not entirely, resolves the dispute before us." *Id.* at 984. According to the Court in *Preston*, *Buckeye* held that when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not a federal or state court. *Id.* at 981. Thus, in *Preston*, the Supreme Court held that because Ferrer's allegation that Preston was acting as an unlicensed talent agent was a challenge to the validity of the contract as a whole, as opposed to the validity of the arbitration clause itself, the TAA's attempt to lodge primary jurisdiction in another forum was superceded by the FAA. *Id.* at 984, 987. The Court expressly recognized, however, that attacks on the validity of the entire contract are distinct from attacks aimed solely at the arbitration clause. *Id.* at 984. Thus, by its terms, *Preston* is inapplicable to our case because the Concepcions are not challenging the validity of the service contract with AT & T as a whole, but only the validity of the arbitration agreement. Likewise, nothing in *Preston* undercuts the rationale of *Shroyer* that the FAA does not impliedly preempt California unconscionability law, because the plaintiffs in *Shroyer* were also challenging only the validity of the arbitration agreement. Because *Shroyer* still controls, California unconscionability law is not impliedly preempted by the FAA.

IV. Conclusion

We affirm the district court's denial of AT & T's motion to compel arbitration.

AFFIRMED.

APPENDIX B

United States District Court,
Southern District of California.

Jennifer L. LASTER, et al., Plaintiffs,
v.
T-MOBILE USA, INC., et al., Defendants.

No. 05cv1167 DMS (AJB).
Aug. 11, 2008.

ORDER:

(1) DENYING ATTM'S MOTION TO COMPEL ARBITRATION AS TO THE CONCEPCION PLAINTIFFS; and

(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS WITH PREJUDICE

DANA M. SABRAW, District Judge.

In this putative class action, Plaintiffs assert that Defendants-cellular phone companies and other entities involved with the sale of wireless telecommunication services-have engaged in the unfair and deceptive practice of charging consumers sales tax on the full retail value of cellular phones that were advertised as "free" or at substantial discounts, in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, *et seq.* In addition, based on these alleged violations, Plaintiffs seek restitution under the

Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770, *et seq.*

Presently before the Court are two motions. First, Defendant AT & T Mobility LLC (formerly Cingular Wireless, abbreviated herein as "ATTM") moves to compel Plaintiffs Vincent and Liza Concepcion to arbitrate their claims, pursuant to an arbitration clause contained in their Wireless Service Agreement ("WSA"). (Doc. 128). In addition, Defendants T-Mobile USA, Inc., Omni Point Communications, Inc. dba T-Mobile, TMO CA/NC, LLC (collectively, "T-Mobile"); Cellco Partnership dba Verizon Wireless, Verizon Wireless LLC dba Verizon Wireless, Airtouch Cellular dba Verizon Wireless (collectively, "Verizon"); and Go Wireless, Inc. ("Go Wireless") move pursuant to Rule 12(b)(6) to dismiss with prejudice the Second Amended Complaint ("SAC"). (Doc. 78).

For the reasons discussed below, the Court denies Defendant ATTM's motion to compel arbitration, and denies Defendants' collective motion to dismiss Plaintiffs' UCL and FAL claims. Further, the Court grants Defendants' motion to dismiss Plaintiffs' CLRA restitution claim with prejudice.[1]

V. FACTUAL AND PROCEDURAL BACKGROUND

Defendants are engaged in the business of marketing and selling wireless telecommunications products, including cellular phones, accessories and service. These products often are sold as part of a

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[1] Plaintiffs' motion to strike the declaration of Richard Nagareda is denied. [Doc. 145].

"bundled" transaction, whereby the consumer receives a free or significantly discounted cellular phone, in exchange for agreeing to a wireless service contract for a specified duration. However, when Defendants offer the free or substantially discounted phone as part of a bundled transaction, they generally charge consumers sales tax (approximately 7.75%) based on the full retail value of the phone. Plaintiffs contend this practice is improper because Defendants should not charge sales tax on a phone advertised as "free," and should not charge sales tax on the full retail value of a phone advertised at a substantial discount.

A. The Concepcion Plaintiffs and their Arbitration Agreement

In February 2002, Plaintiffs Vincent and Liza Concepcion, allegedly relying upon advertising by AT'TM (then Cingular), entered into an agreement for cellular phone service and the purchase of cellular phones at a Cingular retail outlet in Carlsbad, California. In conjunction with the purchase of the service package, the Concepcions were not charged for the phone. (*Id.*) However, Defendants charged the Concepcions a total of $30.22 in sales tax, based on the full retail value of the phone.

The Concepcions' WSA incorporates a statement of "Terms and Conditions," which is a one-page, legal-sized paper with approximately 5/16 inch side margins, completely filled with terms printed in small font. Near the bottom of the page, within a paragraph limiting liability, the word "ARBITRATION" appears in bold, capital letters. The next sentence cautions the consumer to "read this paragraph carefully." It then provides that the customer and ATTM (then Cingular) are to "negotiate in good faith to set-

tle any dispute or claim arising from or relating to this Agreement. If CINGULAR and you do not reach agreement within 30 days, instead of suing in court, CINGULAR and you agree to arbitrate any and all disputes and claims . . . arising out of or relating to this Agreement." (Berinhout Decl., Exh. 11). In setting forth the terms of the arbitration, the agreement specifies, "CINGULAR and you agree that no Arbitrator has the authority to (1) award relief in excess of what this agreement provides; (2) award punitive damages or any other damages not measured by the prevailing party's actual damages; or (3) order consolidation or class arbitration." (*Id.*) However, under the agreement, "either party may bring an action in small claims court." (*Id.*).

The Concepcions renewed their wireless service on several occasions, including in May 2003 and February 2005. Each time, they agreed to ATTM's then-current Terms of Service. Each time, the Terms of Service contained a "change-in-terms" clause, which authorized ATTM to "change any terms, conditions, rates, fees, expenses, or charges regarding your service at any time" and explained that ATTM would "provide [its customers] with notice of such changes . . . either in [their] monthly bill[s] or separately." (*Id.*, Exh. 16).

On March 27, 2006, the Concepcions filed their Complaint in this Court. In May 2006, they again renewed their wireless service. In December 2006, ATTM revised its arbitration provision and mailed the revised version to all customers, including the Concepcions, in an envelope containing their monthly invoice. ATTM "slightly clarified" the language of the revised provision in January 2007, and included the new provision in the January, February,

and March 2007 bills. The revised version continues to require all disputes between AT&TM and its customers to be resolved either in small claims court or through individual arbitration paid for by AT&TM, rather than class-wide arbitration.[2] (*Id.*, Exh. 2). However, the new arbitration provision contains significant changes, as follows:

1. If the arbitrator issues an award in favor of a California customer that is greater than "[AT&TM]'s last written settlement offer made before an arbitrator was selected" but less than $7,500, AT&TM will pay the customer $7,500 rather than the smaller arbitral award. (The "Premium")

2. If the arbitrator awards a customer more than AT&TM's last written settlement offer, then "[AT&TM] will . . . pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the customer's] attorney reasonably accrues for investigating, preparing, and pursuing [his] claim in arbitration."

3. AT&TM "agrees that it will not seek" attorneys' fees and expenses "if it prevails in arbitration," even though "under some laws [AT&TM] might have a right to [such an award]."

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[2] The new arbitration provision, as well as the former provision, provide: AT&TM will pay "all [American Arbitration Association ("AAA")] filing, administration and arbitrator fees" unless the arbitrator determines that the claim "is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))." Any such costs are capped at $125. (AAA Consumer Procedures § C-8).

4. Punitive damages may be awarded to the same extent such damages would be available in court.

5. For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a telephonic hearing, or a "desk" arbitration wherein the arbitration is conducted "solely on the bases of documents submitted to this arbitrator."

6. Arbitration will take place in the county of the customer's billing address.

(*Id.* Exh. 2). Accordingly, the new arbitration provision provides the customer, among other things, a $7,500 Premium and double attorneys' fees if the customer prevails in arbitration, a right to pursue punitive damages, venue convenient to the customer, and a choice of in-person, telephonic or "desk" (*i.e.*, submitted in writing) arbitration. In addition, ATTM agrees to waive recovery of its attorney's fees and costs if it prevails in arbitration.

According to ATTM, the "vast majority of disputes" never reach arbitration, because ATTM's customer service department resolves the disputes by phone or e-mail. For example, in 2007, ATTM provided over $1.3 billion in manual credits to resolve customer concerns and complaints. (Motion to Compel at 5, citing Berinhout Decl. ¶ 16). A customer whose concerns are not satisfactorily resolved can take the next step-as required by the arbitration provision-and provide ATTM's legal department with notice of the dispute. To begin this process, a customer may send a letter or fill out a one-page "Notice of Dispute" form that may be obtained from ATTM's

website. On the Notice of Dispute, the customer provides basic contact information, and a brief description of the nature of the dispute and the relief sought. (*Id.*, Exh. 8). ATTM generally responds to the Notice of Dispute form by making a settlement offer within 30 days of receiving the form. The process initiated by mailing the Notice of Dispute is fairly characterized as an "informal claims process." If the dispute is not resolved to the customer's satisfaction at this stage, the customer may submit a one-page "Demand for Arbitration" form to AAA and ATTM. The demand form is available on the websites of both AAA and ATTM. (*Id.*). Also posted on ATTM's website is a layperson's guide on how to arbitrate a claim. (*Id.*, Exh. 3). Between December 23, 2006 and February 8, 2008, ATTM received over 570 Notices of Dispute and Demands for Arbitration. (*Id.* at 5, citing Berinhout Decl. ¶ 19).

B. The Voorhies and Laster Plaintiffs

On November 14, 2004, relying upon Cingular's advertisement for a free phone, Elizabeth Voorhies entered into a bundled transaction to obtain a new cellular phone and wireless service from Cingular, through its authorized agent, Go Wireless, in Poway, California. (SAC ¶ 5). In conjunction with the purchase of the service package, Voorhies was not charged any amount for the phone. (*Id.*) However, Defendants charged Voorhies a total of $10.31 in sales tax, based on the retail value of the phone. (*Id.*)

On February 23, 2005, relying upon T-Mobile's advertized free phone, Jennifer Laster entered into a bundled transaction with T-Mobile at its Mission Valley Center Store in San Diego, California, whereby she purchased a new phone and activated cellular service. (SAC ¶ 3). At some time during the sales

transaction, Laster received a one-page transaction receipt which indicated, among other things, that while T-Mobile did not charge any amount for the phone, it was charging $28.22 for sales tax based on the full retail value of the phone. (*Id.* ¶ 22).

C. Procedural History

In May 2005, Laster, Voorhies, and an additional named Plaintiff, Andrew Thompson, each filed suits in the Superior Court of San Diego County. Subsequently, Laster's and Voorhies's cases were removed to this Court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1711, *et. seq.* Thompson's case was dismissed without prejudice.

On August 12, 2005, Laster and Voorhies filed a First Amended Complaint against Defendants. They alleged for themselves and on behalf of all consumers who purchased a cellular phone as part of a bundled transaction, that Defendants' practice of advertising "free" or significantly discounted phones, while charging sales tax on the full retail value of the phones, constitutes misleading and unlawful business acts and practices under California's FAL, UCL and CLRA. On November 30, 2005, the Court addressed motions brought by Cingular and T-Mobile to compel Laster and Voorhies to arbitration, and motions by all Defendants to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court denied the motions to compel, finding the arbitration agreements to be procedurally and substantively unconscionable under California contract law. The Court further determined that the Federal Arbitration Act did not preempt California contract law. In addition, the Court granted the motions to dismiss the FAC as follows: The UCL and FAL claims were dismissed with leave to amend because

Plaintiffs failed to allege they relied upon the alleged misrepresentations in deciding to purchase Defendants' cell phones. (Order, Doc. 61 at 17). The CLRA claim was dismissed with prejudice because Plaintiffs failed to comply with the statutory notice requirement set forth in California Civil Code § 1782. (*Id.* at 18).

On December 22, 2005, ATTM and T-Mobile appealed the Court's order denying their motion to compel arbitration, and moved for a stay of proceedings pending appeal. (Doc. 65-68). The other Defendants joined in the motion. (Doc. 81, 83). On December 30, 2005, Plaintiffs filed a Second Amended Complaint. (Doc. 70, "SAC"). On January 19, 2006, Defendants filed the instant motion to dismiss the SAC, (Doc. 78), and on February 8, 2006, Plaintiffs opposed both the motion to dismiss and the motion to stay proceedings pending appeal. (Doc. 86, 88). On March 14, 2006, the Court granted the motion for stay pending appeal. (Doc. 98). On September 7, 2006, the Court briefly lifted the stay to consolidate *Concepcion v. Cingular Wireless LLC*, (Case No. 06cv0675) with the *Laster* case. The Court then reimposed the stay pending appeal on all consolidated actions. (Doc. 109).

On August 17, 2007, the Ninth Circuit Court of Appeals in *Shroyer v. New Cingular Wireless Services*, held that a class arbitration waiver in Cingular's standard contract for cellular phone services was unconscionable under California law and that the Federal Arbitration Act did "not preempt a holding that the waiver is unenforceable." 498 F.3d 976, 978 (9th Cir. 2007). Because the class arbitration waiver in *Shroyer* is substantively identical to the waiver provision that this Court found to be unconscionable in

Laster, the Court of Appeals ordered all parties to "file simultaneous letter briefs . . . discussing the effect, if any, of [*Shroyer*]" on the appeal. (Doc. 110). In response, on September 28, 2007, all Defendants save T-Mobile voluntarily dismissed their appeals. (Doc. 111).

In T-Mobile's remaining appeal, the Ninth Circuit affirmed this Court's order in an unpublished memorandum dated October 25, 2007. (No. 06-55010). On January 25, 2008, T-Mobile sought review of the Ninth Circuit's decision in the Supreme Court of the United States. (Doc. 114). This Court thereafter held a status conference on February 5, 2008, at which the previously imposed stay pending appeal was lifted. The Court granted the parties' request to supplement the motion to dismiss the SAC, which was heard on May 30, 2008. On May 27, 2008, the United States Supreme Court denied T-Mobile's petition for certiorari. (Doc. 151).

In the meantime, on March 13, 2008, ATTM filed a motion to compel the *Concepcion* Plaintiffs to individual arbitration, arguing they are subject to a class arbitration waiver that is substantively distinct from the waiver rejected by both this Court in *Laster* and the Ninth Circuit in *Shroyer*. (Doc. 127). All motions have been fully briefed, and oral argument was heard on the motions on May 30, 2008.

VI. DISCUSSION

A. Motion to Compel Arbitration

1. Legal Standard

The Federal Arbitration Act ("FAA") governs arbitration agreements in contracts involving transactions in interstate commerce. 9 U.S.C. § 1; *Moses H.*

Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Congress intended courts to construe commerce as broadly as possible. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). Pursuant to Section 2 of the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In determining whether to compel a party to arbitration, a district court may not review the merits of the dispute; rather, the court must limit its inquiry to: (1) whether a valid agreement to arbitrate exists, and, if it does (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Finally, a court interpreting an arbitration agreement must give due regard to the federal policy favoring arbitration; ambiguities as to the scope of the arbitration clause are resolved in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *AT & T Techs. Inc. v. Comm. Workers of America*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) ("in the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.")

AT'TM contends the Concepcions are bound by the terms of the arbitration agreement contained in their wireless service agreement, and therefore, this Court is not the proper forum to adjudicate their claims. The Concepcions argue the arbitration provision is not enforceable against them for two reasons: (1) the December 2006 revised arbitration provision does not apply because it was revised after the Con-

cepcions had filed the instant lawsuit, and (2) even if the revised provision is applicable, it (like the original provision) is unconscionable and thus, unenforceable under California law.

2. The Provision at Issue

Plaintiffs first argue the applicable class arbitration waiver is the one that existed at the beginning of this lawsuit in March 2006. Because that provision has been held to [be] unconscionable by this Court and the Ninth Circuit in *Shroyer*, Plaintiffs argue the Court must deny AT&TM's motion to compel. AT&TM argues the revised arbitration provision modified the original service contract between the parties and, as such, applies to the "existing claims" between the parties. The parties dispute whether the revised arbitration provision applies, as it purports to retrospectively modify the original service contract after the present litigation had already begun. (Reply at 1, citing Opp. at 1).

Both Federal and California law support AT&TM's argument that the 2006 revision applies. Under the FAA, "an agreement in writing to submit to arbitration an *existing controversy* arising out of . . . a contract or transaction . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). Thus, several district courts have enforced revisions to an arbitration provision made after litigation has begun, so long as the terms of the agreement reflect that intent. *See, e.g. Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 WL 830262, at *7 (E.D. Ark., March 25, 2008) (collecting cases); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 577-79 (W.D.N.C. 2000) (compelling individual arbitration based on terms of provision that had been revised to add a class waiver after the commencement of litigation). AT&TM's 2006

provision plainly applies to "**all disputes and claims** between us . . . including . . . claims that arose before this or any prior Agreement . . . [and] claims that are currently the subject of purported class action litigation in which you are not a member of a certified class . . . ." (Berinhout Decl. Exh. 1, at 2). (emphasis in original). Accordingly, under Federal Law, the revised arbitration agreement applies.

Plaintiffs argue the purported modification is ineffective because it was implemented through improper contact between Defendants and members of a class action, which this Court may regulate under Federal Rule of Civil Procedure 23(d). *See In re Currency Conversion Fee Antitrust Litigation*, 224 F.R.D. 555, 569 (S.D.N.Y. 2004). In *Currency Conversion*, the district court used its supervisory power under Rule 23(d) to refuse to enforce an arbitration provision that was retroactively imposed upon certain plaintiffs in a pending class action who were not subject to an arbitration agreement of any kind at the beginning of the litigation. Here, in contrast, the Concepcion Plaintiffs were not singled out for receipt of the revised agreement. Instead, ATTM included the revision in a mailing to all its customers. Moreover, unlike the plaintiffs in *Currency Conversion*, the Concepcion Plaintiffs agreed to arbitration at the time of the initial WSA. The revised agreement merely modified that provision.

Enforcing the modification is also consistent with California contract law. A "change-in-terms" provision authorizes a party to modify the terms of a contract unilaterally, as long as the exercise of that power is consistent with the covenant of good faith and fair dealing. *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 795-96, 79 Cal. Rptr. 2d 273 (1998). Here,

the initial WSA contained an arbitration clause and class action waiver, as did each and every WSA entered into by the Concepcions before the 2006 revision. This unilateral change did not add a new term; it merely modified an old one. *Compare Long v. Fidelity Water Sys.*, 2000 U.S. Dist. LEXIS 7827, *8 (N.D. Cal. 2000) (refusing to apply an after-the-fact arbitration clause when no such clause existed at the time litigation commenced). The terms of arbitration also were modified more favorably to Plaintiffs. As such, the modification is not unreasonable under California law.

3. Unconscionability

While federal policy favors arbitration agreements, federal courts rely on state law when addressing issues of contract validity and enforceability. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936-37 (9th Cir. 2001). Thus, generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the FAA. *Ticknor*, 265 F.3d at 937 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). On a motion to compel arbitration, the trial court does not determine whether the contract as a whole is unconscionable. Instead, the court is limited to determining whether the arbitration clause itself is unconscionable. *See Gray v. Conseco, Inc.*, 2000 WL 1480273 (C.D. Cal. 2000).

"Under California law, a contract provision is unenforceable due to unconscionability only if it is both procedurally and substantively unconscionable." *Shroyer*, 498 F.3d at 981 (citing *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 153, 30 Cal. Rptr. 3d

76, 113 P.3d 1100 (2005)). Procedural unconscionability focuses on "oppression or surprise due to unequal bargaining power," and substantive unconscionability focuses on "overly harsh or one-sided results." *Id.* Procedural and substantive unconscionability, however, "need not be present in the same degree." *Id.* "California courts apply a sliding scale, so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* (citations and internal quotations omitted). A party challenging an arbitration agreement has the burden of proving both procedural and substantive unconscionability. *Crippen v. Central Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189 (2004).

As discussed, both this Court and the Ninth Circuit in *Shroyer* addressed, and struck down, ATTM's first attempt at imposing a class arbitration waiver on its customers. In *Shroyer*, the court noted the Ninth Circuit previously struck down class waiver provisions in related situations. 498 F.3d at 981 (citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir. 2003) (class arbitration waiver in employment contract held unconscionable) and *Ting v. AT & T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (class arbitration waiver in contract for telephone services held unconscionable)). Such contracts have been found to be procedurally unconscionable because of "the adhesive nature of the contract," and substantively unconscionable because of "the imposition of a one-sided and oppressive class action waiver provision." *Shroyer*, 498 F.3d at 981 (citations omitted). *See also Ingle*, 328 F.3d at 1176 (Circuit City's class arbitration waiver "is manifestly one-sided" given

that the company would never "bring a class proceeding against an employee").

Following *Ingle* and *Ting*, the California Supreme Court in *Discover Bank*, 36 Cal. 4th at 153, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, held that "at least in some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." The court in *Discover Bank* outlined the circumstances under which a class waiver provision in an adhesion contract may be subject to a finding of procedural and substantive unconscionability under California law:

> [W]hen the waiver is found in [a] consumer contract of adhesion in a setting in which disputes between the contacting parties predictably involve small amounts of damages, and when it is alleged that the a party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud . . . . (Civ. Code § 1668). Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Id. at 162, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

Based on the above language, the Ninth Circuit and California courts have construed *Discover Bank* as providing a three-part inquiry to determine

whether a class waiver in a consumer contract is unconscionable: (1) whether the agreement is a consumer contract of adhesion drafted by a party of superior bargaining power; (2) whether the agreement occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages; and (3) whether it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Shroyer*, 498 F.3d at 983 (citations omitted). At the heart of this three-pronged inquiry is a concern that a party such as AT&TM may "exempt" itself from wrongdoing through the imposition of a one-sided class waiver provision. As noted in *Discover Bank*, "class action waivers in such [consumer] contracts may . . . be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy."[3] 36 Cal. 4th at 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. The court in *Discover Bank* emphasized this point by stating: "[B]ecause . . . damages in consumer cases are often small and because '[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit,' . . . 'the class action is often the only effective way to *halt and redress* such exploitation.'" *Id.* (citation omitted) (emphasis added). "Fully aware that few customers will go to the time and trouble of suing in small claims

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[3] The public policy referenced in *Discovery Bank* is embodied in California Civil Code § 1668, which provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

court" or "pursuing other legal remedies," companies with superior bargaining power have "sought to create for [themselves] virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to [their] own rights." *Id.* at 159, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (citing *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100-01, 118 Cal. Rptr. 2d 862 (2002)). As noted in *Shroyer*, the court in *Discover Bank* "was concerned that when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation," *Shroyer*, 498 F.3d at 986 (original emphasis), and thus class litigation or arbitration (or some other "adequate substitute") is necessary to effectively halt and redress such potential exploitation.

Accordingly, for a class waiver in a consumer contract of adhesion to withstand scrutiny (*i.e.*, not to be found substantively unconscionable), *Discover Bank* demands that the contract provide an "adequate substitute for the class action or arbitration mechanism." 36 Cal. 4th at 162, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. In determining whether ATTM's revised arbitration provision provides an "adequate substitute," this Court must consider the benefits of class action litigation and classwide arbitration as articulated by *Discover Bank*.

First, *Discover Bank* noted the class mechanism facilitates redress to individuals whose recovery "would be insufficient to justify bringing a separate action." 36 Cal. 4th at 156, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. Second, *Discover Bank* noted the class mechanism "produces several salutary by-products including a *therapeutic effect* upon those sellers who indulge in fraudulent practices . . . ." *Id.* (emphasis

added). Finally, *Discover Bank* noted generally that (a) the availability of attorney fees to the prevailing party in arbitration is an insufficient substitute for class litigation or arbitration, and (b) "small claims litigation, government prosecution, or informal resolution" of claims involving small amounts of damages are not adequate substitutes for class litigation or arbitration. *Id.* Notably, however, the court declined to hold that class waiver provisions are *void* as against public policy (or *per se* invalid), only that they are *voidable*. The court noted: "We do not hold that all class action waivers are necessarily unconscionable." *Id.*

The question presented, therefore, is whether the arbitration provision now before the Court sufficiently addresses the concerns of *Discover Bank* and provides an adequate substitute for class litigation or arbitration. For the reasons set forth below, the Court concludes it does not.[4]

a. Contract of Adhesion

As noted, "[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Discover Bank*, 36 Cal. 4th at 160, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. In its November 30, 2005 Order, this Court found that AT&TM's original arbitration agreement was a con-

[4] At least one other court has addressed the arbitration provision in question and held it to be unconscionable under California Law. *Steiner v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016 (N.D. Cal. 2008).

tract of adhesion but noted the contract was presented to the Plaintiffs at the time of purchase (rather than in a subsequent mailer after the consumer had already purchased and activated the phone). Under such circumstances, ATTM's contract was found to be "on the low end of the spectrum of procedural unconscionability." (Order, Nov. 30, 2005 at 9). Although the revised terms of the arbitration agreement were mailed to the Concepcions after they purchased the phone, the original (less favorable) arbitration provisions were presented at the time of purchase. The subsequent mailer merely altered the existing agreement in a way that made the arbitration provisions more favorable to the Concepcions. Accordingly, the Court finds that ATTM's arbitration agreement with the Concepcions is on the low end of the spectrum of procedural unconscionability.

b. Predictably Small Amounts of Damages

The presence of predictably small amounts of damages (or individual gain) invokes the concern of *Discover Bank* that without class litigation or arbitration, individuals have no "method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Discover Bank*, 36 Cal. 4th at 157, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. If an individual's expected damages are so small as to make arbitration or litigation impractical, a class waiver is unconscionable "to the extent [it] operate[s] to insulate a party [with superior bargaining power] from liability." *Id.* at 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

This Court found ATTM's original arbitration provision met the "predictably small amounts of damages" prong of the *Discover Bank* test because in

the context of Plaintiffs' deceptive advertising claim, a consumer who pursues arbitration generally could recover no more than $30: the sales tax on the original retail price of a cellular phone. (Order, Nov. 30, 2005 at 11). In addition, ATTM's agreement to pay (sometimes significant) arbitration costs regardless of who prevailed,[5] as well as attorney fees to the prevailing party, did not change the result, because even if a consumer incurred no monetary cost, the expenditure of time, effort and emotional resources to pursue arbitration outweighed the minuscule benefits of arbitration. As Judge Richard Posner famously observed, "only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004). The net effect: the arbitration provision and class action waiver operated to preclude recovery for ATTM's customers with disputes involving small amounts of damages. Such customers would not bother to pursue individual litigation or arbitration, and if precluded from participation in classwide litigation or arbitration, would effectively have no redress.

While the new arbitration provision does not change the amount of actual damages at issue ($30), it does exponentially change the amount of potential recovery in arbitration.[6] If ATTM denies an informal claim (*i.e.*, the Notice of Dispute) or offers less than

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[5] The minimum cost for "in-person" arbitration is $1,700. $750 in administrative fees, a $200 case service fee, and $750 in arbitrator fees. (Motion to Compel at 15, n.13.)

[6] $7,500 is the amount of the Premium in California because it is the maximum allowable recovery in small claims court. The amount changes based upon the small claims limit in the relevant jurisdiction.

the consumer requests-which are the only scenarios that would prompt a consumer to pursue arbitration-the amount of the consumer's award upon prevailing at arbitration jumps to $7,500 (the "Premium") plus double attorney's fees, if the consumer is represented by counsel. With the potential to recover two hundred fifty times one's actual damages, ATTM argues individual claimants are much more likely to pursue arbitration if they are unsatisfied with ATTM's offer during the informal claims process. The Court agrees.

Plaintiffs argue the *potential* for recovery of the $7,500 Premium and double attorneys' fee is "so remote" as to be illusory because, in the informal claims process, ATTM will simply *pay* its customers' demand in full rather than incur costs of arbitration (approximately $1,700 for in-person arbitration), as well as Premium-based damages ($7,500) and double attorney's fees.[7] (Oppo. to Motion to Compel at 8-9). ATTM's self-interest, according to Plaintiffs, is "best served" by offering the consumer his or her full demand so ATTM "will never pay the full $7500 due under the 'premium.'" (Oppo. to Motion to Compel at 9.) Because the Premium "only becomes available if the customer prevails after rejecting [ATTM's] last

[7] As ATTM notes, a consumer's Notice of Demand may include a request for attorney's fees as the attorney fee provision in question "supplements" any right to such fees that the customer may have under applicable law. Thus, a customer who prevails on a statutory claim that allows for attorney's fees is entitled to a fee award, and the fee is doubled if the arbitrator awards the customer more than ATTM's last written settlement offer. Accordingly, ATTM has an incentive to include reasonable attorney's fees in its settlement offers, and has a policy of doing so. (Reply to Motion to Compel at 6.)

settlement offer and is awarded a greater amount than that last settlement offer," Plaintiffs predict, "[ATTM] will surely never allow this situation to arise." (*Id.* at 8, n.4).

Plaintiffs' argument actually supports ATTM's position for two reasons. First, Plaintiffs acknowledge that the new provision prompts ATTM to *accept liability,* rather than "escape liability," for small dollar claims made during the *informal claims process* (even for claims of questionable merit and for claims it does not owe). Plaintiffs complain that if ATTM is faced with even a "$5 claim" it "would be best served to offer $6, $10, or even $100 just to ensure [it] will never pay the full $7,500 due under the Premium." (Opp. to Motion to Compel at 9). By this argument, however, Plaintiffs acknowledge that as a result of the Premium, a consumer is virtually guaranteed a payment by ATTM of up to twenty times ("$100" for a "$5 claim") his or her actual damages simply by filling out a one-page form to initiate the informal claims process.

If ATTM resolves its customer's claims through prompt payment, and does so for fear of being subjected to its contract-based $7,500 Premium, the Premium has served a noble purpose, even if no customer ever actually receives it. The customer will have been made whole, or at least satisfied, and with minimal effort, as he or she need only fill out and mail a one page Notice of Demand which is readily accessible on ATTM's website. The process is quick, easy to use, and prompts full or, as described by Plaintiffs, even excess payment to the customer *without* the need to arbitrate or litigate. In this way, the revised arbitration provision sufficiently incenti-

vizes consumers in disputes involving small dollar amounts to pursue ATTM's informal claims process.

Second, if the informal claims process fails, the $7,500 Premium is available to induce the consumer to pursue individual arbitration. Notably, Plaintiffs do not argue that the $7,500 Premium will not apply, or is insufficient to induce a customer to pursue arbitration, if a claim is not resolved during the informal claims process. It is therefore evident that if ATTM does not resolve the claim informally and to the consumer's satisfaction, the $7,500 Premium remains available as a substantial inducement for the consumer to pursue the claim in arbitration.[8]

The next issue is whether the arbitration provision adequately addresses the "policy at the very core of the class action mechanism . . . to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Discover Bank*, 36 Cal. 4th at 157, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). Plaintiffs argue that a "class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (Oppo. to Motion to Compel at 20, quoting *Discover Bank*, 36 Cal. 4th at 157, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (citations omitted).

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[8] In *Steiner*, 556 F. Supp. 2d at 1030, the court concluded that the Premium is illusory and thus, an insufficient incentive for individuals to pursue *arbitration*. The court, however, did not address the effect of the Premium as an incentive for individuals to pursue the *informal claims process*.

As discussed, under the revised arbitration provision, nearly all consumers who pursue the informal claims process are very likely to be compensated promptly and in full. In contrast, it appears that consumers who are members of a class do not fare as well. To recover, individual class members generally must file a claim form similar to that contemplated by AT&TM's informal claims process. But the incentive for a class member to file a claim form is low. AT&TM cites studies that show class members rarely receive more than pennies on the dollar for their claims, and that few class members (approximately 1-3 %) bother to file a claim when the amount they would receive is small. (Motion to Compel at 14, n.12.) Plaintiffs do not dispute these statistics. What class actions *actually* offer to individual consumers with small dollar claims is highly relevant to the determination of whether a proposed alternative procedure is an adequate substitute for class litigation or arbitration.

AT&TM argues its arbitration procedure is an adequate substitute to the class mechanism: "[T]here is nothing unfair about the tradeoff that [AT&TM's] customers make. In exchange for relinquishing the ability to bring or join a class action, customers receive a dispute resolution mechanism that affords them either a quick settlement offer that often will amount to a full recover), or cost-free arbitration that provides them with the potential for a significant 'individual gain' in the form of a $7,500 premium-an amount that substantially exceeds the size of claims they might make." (Reply Brief at 7.) The new arbitration provision "allows both customers and AT&TM to win. Customers' claims are resolved quickly and fully, and AT&TM achieves significant savings on transaction costs (which in part are passed on to cus-

tomers) while retaining good relations with its customers." (Reply Brief at 7.) The Court agrees.

Given the unrebutted class action statistics above-pennies on the dollar with few consumers actually submitting claims in class litigation-as well as Plaintiffs' concession that the Premium prompts early payment of small dollar claims, the record before the Court demonstrates that a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars. Because the arbitration provision provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim, the subject provision is an adequate substitute for class arbitration as to this prong of *Discover Bank*.

c. Allegations that AT&M Deliberately Cheated Large Numbers of Consumers out of Individually Small Sums of Money

While the second prong of *Discover Bank* addresses the class action function of providing *recovery* to individuals with disputes involving small amounts of damages, the third prong addresses the "role of the class action in *deterring* . . . wrongdoing." *Discover Bank*, 36 Cal. 4th at 156, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (emphasis added). Instead of focusing on the ability of a proposed alternative mechanism to provide relief to aggrieved consumers, this prong speaks to the concern that eliminating class actions "would permit the defendant to retain the benefits of

its wrongful conduct and to continue that conduct with impunity." *Id.* Accordingly, under this prong, the Court addresses whether-given the allegations in this case-the elimination of a class action remedy in exchange for AT'TM's proposed dispute resolution mechanism would undermine this stated public policy and vitiate the "therapeutic effect" of class actions in "halting" fraudulent conduct. *Id.* at 156-61, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

In its November 30, 3005 Order, the Court held that this prong was met because Plaintiffs alleged that AT'TM was engaged in a scheme to illegally charge a relatively small amount of money for a phone it advertised as "free." (Order, Nov. 30, 2005 at 12). The allegations in this respect have not changed, but as discussed in some detail above, the arbitration provision has dramatically changed. Nevertheless, Plaintiffs argue that "[e]ven if [individual] potential plaintiffs would be willing to fight to protect their rights [over small damage claims], many claims still will go unremedied in the absence of a class action because, especially *as to deceptive practices* directed toward unwary consumers, *'[m]any plaintiffs may not know their rights are being violated.'*" (Oppo. at 21) (citation omitted) (emphasis added). According to Plaintiffs, prohibiting class litigation and requiring individual actions would leave many consumers "like the class members Plaintiffs represent with no recovery at all for violations of their rights, even if there would be attorneys willing to take their cases. Only the class procedures heralded in California courts-and their provisions for notifying potential class members-can address these problems." (*Id.* at 21, 30 Cal. Rptr. 3d 76, 113 P.3d 1100) (emphasis added).

ATTM did not respond to this argument in its reply brief. However, in its moving papers, ATTM argued, but provided no evidence, that the Premium-based incentive is "likely to facilitate the development of a market for fair settlement" of consumer claims. (Motion to Compel at 15, citing Nagareda Decl. ¶ 11). It is unclear how this "market" would be created, whether such a market presently exists, and how such a market would apprise consumers of alleged wrongdoing. Presumably, if a market for fair settlement exists, it may provide an adequate substitute for class litigation as those who are harmed by, but unaware of, wrongdoing apparently would be provided notice and have an opportunity to redress such wrongdoing through ATTM's informal claims and arbitration process. In this way, such a market theoretically would have a deterrent effect on alleged corporate wrongdoing.

While ATTM notes that the revised arbitration provision has been in place for approximately 70 million customers for over 15 months, it does not point to any claims (Notices of Dispute or Demands for Arbitration) for deceptive advertising. In addition, ATTM's informal resolution of disputes during 2007 for $1.3 billion appears to involve "billing problems," and not claims for deceptive advertising or other alleged wrongdoing by ATTM. (*See* Berinhout Decl. ¶¶ 15-16.) Further, of the 570 people who have pursued arbitration against ATTM (either through the filing of a Notice of Dispute or Demand for Arbitration), ATTM has failed to identify the nature or amount of these claims. Without such evidence, the Court is unable to determine (a) whether a market for settlement exists; (b) if so, whether the market created by the arbitration provision is an adequate substitute for class arbitration *vis-a-vis* putative

members of a class who are (absent notice) unaware of the violations alleged in the present litigation; and (c) whether such a market would adequately deter ATTM's alleged wrongdoing.

ATTM may complain that it has received few claims, or perhaps no claims, for deceptive advertising because no such wrongdoing occurred, and that the alleged wrongdoing is manufactured by Plaintiffs' lawyers to create a putative class action. That may be true; or Plaintiffs' claim may be true (that the alleged wrongdoing exists but few consumers are aware of it). Regardless, at this stage of the proceedings, Plaintiffs have stated a claim (as discussed *infra* at § II, B) and the Court's inquiry necessarily is focused on whether the arbitration provision is an adequate substitute for the deterrent effect of the class action mechanism. Plaintiffs argue that if the arbitration provision is enforced, ATTM will simply pay the Concepcions what they are owed to avoid risking payment of the Premium, and thereby also avoid potential liability to thousands of other customers who have no knowledge of the alleged wrongdoing. ATTM, Plaintiffs say, will therefore have no incentive to stop its wrongdoing.[9]

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[9] While the revised arbitration provision permits punitive damages claims, which could be used by an individual claimant in arbitration to deter alleged corporate wrongdoing, the United States Supreme Court has effectively limited punitive damages awards to ten times compensatory damages, making the maximum possible damage award $75,000. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) ("[F]ew awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.") One, or even several, such damage awards would be an insufficient substitute for the

(footnote continued on next page)

Faithful adherence to California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages, compels the Court to invalidate ATTM's class waiver provision. A class waiver provision may "serve[ ] as a disincentive for [a party with superior bargaining power] to avoid the type of conduct that might lead to class action litigation in the first place." *Discover Bank*, 36 Cal. 4th at 159, 30 Cal Rptr. 3d 76, 113 P.3d 1100 (quoting *Szetela*, 97 Cal App. 4th at 1101, 118 Cal. Rptr. 2d 862). "By imposing [a class waiver] clause on its customers, [a party with superior bargaining power] has essentially granted itself a license to push the boundaries of good business practices to their farthest limits . . . ." *Id.* This overarching policy concern of deterring corporate wrongdoing is not sufficiently addressed by ATTM's revised arbitration provision.

In balancing the relative procedural and substantive unconscionability of the revised arbitration provision, Plaintiffs have met their burden of establishing that the provision is unconscionable as ap-

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deterrent effect caused by the threat of large damage awards that frequently accompany class action lawsuits.

plied to them under California law.[10] ATTM's motion to compel arbitration is denied.[11]

B. Motion to Dismiss

1. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. Fed. R. Civ.P. 12(b)(6). *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds* by *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). In answering this question, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in plaintiffs favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. *See United*

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[10] Although the Conceptions arguably would be better off to individually pursue their claim in arbitration (as their net recovery may be larger and more quickly paid through ATTM's informal claims and arbitration process), they have demonstrated by this litigation their desire to forego their individual rights under the arbitration provision in order to pursue relief on behalf of a larger group of consumers.

[11] For the reasons set forth in the Court's November 30, 2006 Order, the Court declines to conclude that the FAA preempts any holding that ATTM's arbitration provision is unenforceable under California law.

States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

Defendants seek dismissal of Plaintiffs' SAC on four grounds: (1) Plaintiffs lack standing to bring their claims under California's UCL and FAL because they fail to adequately plead actual reliance and injury in fact; (2) Plaintiffs cannot allege false or deceptive advertising as a matter of law because California law permits the sales tax disclosure complained about by Plaintiffs; (3) Plaintiffs' claim fails because the "chain of causation" was broken when the sales tax was disclosed on the sales receipt; and (4) Plaintiffs' claim for, restitution under the CLRA should be dismissed because, as this Court has previously ruled, their failure to provide statutory notice permits them to receive only injunctive relief. These arguments are addressed in turn.

2. Standing

Section 17200 of the California Business and Professions Code defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]." Cal. Bus. & Prof. § 17200. By defining unfair competition to include any "unlawful . . . business act or practice," the UCL permits violations of other laws to be treated as unfair competition that are independently actionable. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999). As such, any violation of the FAL necessarily violates the UCL. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 210, 197 Cal. Rptr. 783, 673 P.2d 660 (Cal. 1983).

The FAL, which is codified at Section 17500, provides: "It is unlawful for any person . . . corporation or association, or any employee thereof . . . to disseminate or cause to be so made or disseminated [,] any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised." Cal. Bus. & Prof. § 17500. California courts have noted that the FAL prohibits "not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Leoni v. State Bar*, 39 Cal. 3d 609, 626, 217 Cal. Rptr. 423, 704 P.2d 183 (Cal. 1985).

Proposition 64, which was approved by California voters on November 2, 2004, amended certain provisions of the UCL and FAL. Before Proposition 64 passed, an uninjured private party could bring a UCL (or FAL) action on behalf of the "general public," and could obtain remedies on behalf of nonparties. Proposition 64 amended Section 17204 of the UCL, as follows: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively . . . by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. & Prof. Code § 17204. Section 17203, which was also amended by Proposition 64, now provides, with respect to representative private plaintiffs: "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure . . . ." Cal. Bus. & Prof. Code § 17203. Accordingly, after Proposition 64, a person seeking to represent claims on behalf of others must show that

(1) he or she has suffered an injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition or false advertising.

In the November 30, 2005 Order, the Court found that the first prong-injury in fact was-properly alleged. With respect to the second prong, the Court found Plaintiffs had not adequately alleged causation. Plaintiffs' SAC now includes detailed allegations regarding each Plaintiff's reliance on the advertisements to enter the store and purchase the cellular phones. These allegations are sufficient.

3. Safe Harbor

Defendants next argue California law permits the sales tax and level of disclosure that Plaintiffs contend is actionable. In particular, 18 C.C.R. § 1585(b)(3) *requires* "retailers of . . . wireless communication device[s]" to "report and pay tax measured by the unbundled [full retail] sales price of the device and may collect tax or tax reimbursement from its customer measured by the unbundled sales price." Moreover, California Civil Code § 1656.1(a) permits retailers to disclose the sales tax to be collected in the sales contract, sales receipt, or in its advertising. Since Plaintiffs admit the sales tax was disclosed in the sales receipt, Defendants argue Plaintiffs cannot state a claim for Defendants' failure to disclose the tax in their advertising. *See Cal- Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 183, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999) ("[a]cts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law.")

Although wireless communication retailers are required to pay sales tax on the full retail value, may

pass that tax onto consumers, and do not have to advertise the tax, no California law sets forth the disclosure required when the sales tax passed onto the consumer is calculated based upon a price *other than the advertised price*. At this stage of the proceedings, the Court declines to dismiss the action.

4. Causal Chain

Defendants note the SAC alleges that by the time Plaintiffs had completed the transaction, the sales receipt made them aware of the tax and they easily could have stopped the transaction and avoided injury. According to Defendants, the "causal chain is broken by Plaintiffs' acknowledgment that [the] sales tax was listed on the sales receipts." (Def. Supp. at 6). A completed sale, however, is not the only injury Plaintiffs allege.[12] Plaintiffs allege they were induced to "shop for and consider signing a service contract." (SAC ¶ 21). Damages allegedly arising out of events occurring before the sale took place also can be linked to the advertising. Accordingly, the Court declines to find that all damages have been foreclosed because the tax appeared on the sales receipt.

5. Restitution

Defendants also seek dismissal of Plaintiffs' claim for restitution under the CLRA because they

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[12] The Court declines to address whether a "chain of causation" is broken as to damages allegedly occurring during or after the sale, since the SAC adequately alleges damages arising out of events that took place before the sale. In addition, it is unclear whether Plaintiffs received a sales receipt before or after signing a service contract, and whether there was an opportunity to avoid paying the sales tax after it was disclosed.

failed to give proper notice to Defendants of their CLRA claim, as required by California Civil Code § 1782. Section 1782(a) provides:

> Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following:
>
> (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.
>
> (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.
>
> The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California.

Cal. Civ. Code § 1782(a). While litigating the motion to dismiss the FAC, Plaintiffs conceded they failed to comply with the thirty day notice requirement set forth in § 1782. (*See* Order, Nov. 30, 2005 at 17). On those grounds, the Court dismissed the damages claims with prejudice pursuant to *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40-41, 124 Cal. Rptr. 852 (1975) ("The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements . . . . This clear purpose may only be accomplished by a literal application of the notice provisions."). Howev-

er, the claim for injunctive relief was not dismissed because Section 1782(d) authorizes the filing of an action for injunctive relief without first providing notice to the vendor. (Order at 18).

Plaintiffs now claim that restitution, like injunctive relief, is not subject to the notice: requirement. California Civil Code § 1782(d) provides that an "action for injunctive relief . . . may be commenced without compliance with subdivision (a)." Section 1782(a) specifies that the notice: requirement applies to an "action for damages." Plaintiff argues the notice requirement should be: interpreted to encompass only claims for "actual damages," while Defendant argues it should encompass claims for all types of monetary damages, including restitution.

Section 1780, which list the available remedies for violations of the section, includes "actual damages," injunctive relief, and restitution of property. To interpret Section 1782's notice requirement for "damages" to be limited to "actual damages" would render the word "actual" in Section 1780 redundant. In addition, if the Legislature intended Section 1782's reference to "damages" to include *only* "actual damages," it is unclear why it would specifically exempt *only* injunctive relief from the notice requirement in Section 1782(d). Accordingly, the Court finds that the notice requirement applies to monetary damages, regardless of whether such damages are calculated based upon the unjust enrichment of Defendant or the Plaintiffs' loss. Plaintiffs' restitution claim under CLRA is therefore dismissed with prejudice.

VII. CONCLUSION AND ORDER

For these reasons, ATTM's motion to compel the Concepcion Plaintiffs to arbitration is denied; Defendants' motion to dismiss Plaintiffs' claims under the UCL and FAL is denied; and Defendants' motion to dismiss Plaintiffs' claims for restitution under the CLRA is granted with prejudice.

IT IS SO ORDERED.

APPENDIX C

What if I am unsatisfied with the resolution AT&T offers me for a problem I am experiencing?

QUESTION:

What if I am unsatisfied with the resolution AT&T offers me for a problem I am experiencing?

ANSWER:

AT&T Mobility ("AT&T") (formerly Cingular Wireless) is committed to resolving all disputes in a fair, effective, and cost-efficient manner. Accordingly, every customer's Service Agreement provides for disputes to be resolved in binding arbitration or Small Claims Court. AT&T's arbitration provision, which is set forth verbatim below, has been designed to make arbitration as convenient and inexpensive for our customers as possible. Among other things, it specifies that AT&T will bear all of the costs of arbitration (unless an arbitrator determines that a customer's claims are frivolous), and that, under certain circumstances (explained in the arbitration provision), AT&T will pay a premium to you and your attorney if you receive an arbitration award greater than the value of AT&T's settlement offer. This right to attorney's fees supplements any right that you may have under applicable law (as explained in the provision).

As part of AT&T's commitment to the fair, effective, and cost-efficient resolution of all disputes, AT&T has made its current arbitration provision available to all current and former customers – including customers who were customers of Cingular

Wireless, the former AT&T Wireless, BellSouth Mobility, Ameritech Mobile, Pacific Bell Wireless, SBMS, SNET Mobility, and SBC Wireless. AT&T will abide by the terms of its current arbitration provision in all instances. In particular, in those rare occasions when AT&T may have a claim against a current or former customer, AT&T will arbitrate that claim or bring it in small claims court, even if a predecessor company's arbitration provision entitles AT&T to pursue such claims in any court that has jurisdiction. Customers whose contracts include arbitration provisions that differ from this current arbitration provision may, of course, arbitrate pursuant to the terms of those contracts if they prefer to do so. Similarly, it you are a former customer whose contract did not include an arbitration provision, you may arbitrate any dispute you may have under the current arbitration provision.

DISPUTE RESOLUTION BY BINDING ARBITRATION

Please read this carefully. It affects your rights.

Summary:

Most customer concerns can be resolved quickly and to the customer's satisfaction by calling our customer service department at 800-331-0500. **In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction (or if AT&T has not been able to resolve a dispute it has with you after attempting to do so informally), we each agree to resolve those disputes through binding arbitration or small claims court instead of in courts of general jurisdic-**

tion. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. **Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.** AT&T will pay all costs of arbitration, no matter who wins, so long as your claim is not frivolous. Moreover, in arbitration you are entitled to recover attorneys' fees from AT&T to at least the same extent as you would be in court. In addition, under certain circumstances (as explained below), AT&T will pay you and your attorney a special premium if the arbitrator awards you an amount that is greater than what AT&T has offered you to settle the dispute.

Arbitration Agreement:

(1) AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:

claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising); claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and claims that may arise after the termination of this Agreement. References to "AT&T," "you," and "us" include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, succes-

sors and assigns, as well as all authorized or unauthorized users or beneficiaries of services or equipment under this or prior Agreements between us.

Notwithstanding the foregoing, either party may bring an individual action in small claims court. **You agree that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by jury or to participate in a class action.** This Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision. This arbitration provision shall survive termination of this Agreement.

(2) A party who intends to seek arbitration must first send to the other, by certified mail, a written Notice of Dispute ("Notice"). The Notice to AT&T should be addressed to: General Counsel, AT&T Mobility LLC, 5565 Glenridge Connector, 20th Floor, Atlanta, GA 30342 ("Notice Address"). The Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If AT&T and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or AT&T may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by AT&T or you shall not be disclosed to the arbitrator until after the arbitrator determines the amount, if any, to which you or AT&T is entitled.

You may download or copy a form Notice and a form to initiate arbitration from here:

http://www.wireless.att.com/arbitration-forms.

(3) After AT&T receives notice at the Notice Address that you have commenced arbitration, it will

promptly reimburse you for your payment of the filing fee. (The filing fee currently is $125 for claims under $10,000, but is subject to change by the arbitration provider. If you are unable to pay this fee, AT&T will pay it directly upon receiving a written request at the Notice Address.) The arbitration will be governed by the Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be administered by the AAA. The AAA Rules are available online at www.adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address. (You may obtain information that is designed for non-lawyers, about the arbitration process at http://www.wireless.att.com/arbitration-information). All issues are for the arbitrator to decide, including the scope of this arbitration provision, but the arbitrator is bound by the terms of this Agreement. Unless AT&T and you agree otherwise, any arbitration hearings will take place in the county (or parish) of your billing address. If your claim is for $10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds $10,000, the right to a hearing will be determined by the AAA Rules. Except as otherwise provided for herein, AT&T will pay all AAA filing, administration and arbitrator fees for any arbitration initiated in accordance with the notice requirements above. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose

(as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. In such case, you agree to reimburse AT&T for all monies previously disbursed by it that are otherwise your obligation to pay under the AAA Rules.

(4) If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is:

- equal to or less than the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address; and greater than the value of AT&T's last written settlement offer made before an arbitrator was selected:

then AT&T will:

- pay you the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address ("the premium") instead of the arbitrator's award; and
- pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium").

If AT&T did not make a written offer to settle the dispute before an arbitrator was selected, you and your attorney will be entitled to receive the premium and the attorney premium, respectively, if the arbitrator awards you any relief on the merits. The arbitrator may make rulings and resolve disputes as to the payment and reimbursement of fees, expenses,

and the premium and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the arbitrator's ruling on the merits.

(5) The right to attorneys' fees and expenses discussed in paragraph (4) supplements any right to attorneys' fees and expenses you may have under applicable law. Thus, if you would be entitled to a larger amount under the applicable law, this provision does not preclude the arbitrator from awarding you that amount. However, you may not recover duplicative awards of attorneys' fees or costs. Although under some laws AT&T may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, AT&T agrees that it will not seek such an award.

(6) The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.** Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific proviso is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

(7) Notwithstanding any provision in this Agreement to the contrary, we agree that if AT&T makes any change to this arbitration provision (other

than a change to the Notice Address) during your Service Commitment, you may reject any such change and require AT&T to adhere to the language in this provision if a dispute between us arises.

If you are viewing information on devices or services, please note: content reflects instructions for devices and services purchased from AT&T.

Some differences may exist for devices not purchased from AT&T.

APPENDIX D

Courts have ruled that agreements to arbitrate on an individual basis are enforceable under the laws of the following states when (1) the consumer's share of arbitration costs is capped at or below the equivalent court filing fee; and (2) individual remedies, including statutory awards of attorneys' fees, are available.

State	Case
Alabama	*Milligan* v. *Comcast Corp.*, 2007 WL 4885492, at *2 (N.D. Ala. Jan. 22, 2007); *Battels* v. *Sears Nat'l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Lawrence* v. *Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Billups* v. *Bankfirst*, 294 F. Supp. 2d 1265, 1274-1277 (M.D. Ala. 2003); *Gipson* v. *Cross Country Bank*, 294 F. Supp. 2d 1251, 1260-1264 (M.D. Ala. 2003); *Pitchford* v. *AmSouth Bank*, 285 F. Supp. 2d 1286, 1295-1296 (M.D. Ala. 2003); *Stephens* v. *Wachovia Corp.*, 2008 WL 686214, at *6-*7 (W.D.N.C. Mar. 7, 2008)
Arkansas	*Easter* v. *Compucredit Corp.*, 2009 WL 499384, at *5-*6 (W.D. Ark. Feb. 27, 2009); *Davidson* v. *Cingular Wireless LLC*, 2007 WL 896349, at *5-*8 (E.D. Ark. Mar. 23, 2007)
Colorado	*Rains* v. *Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Bonanno* v. *Quizno's Franchise Co.*, 2009 WL 1068744, at *17-*23 (D. Colo. Apr. 20, 2009); *Ornelas* v. *Sonic-Denver T, Inc.*, 2007 WL 274738, at *5-*6 (D. Colo. Jan. 29, 2007)

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District of Columbia	*Szymkowicz* v. *DirecTV, Inc.*, 2007 WL 1424652, at *2 (D.D.C. May 9, 2007)
Georgia	*Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-878 (11th Cir. 2005); *Coffey* v. *Kellogg Brown & Root*, 2009 WL 2515649, at *10-*13 (N.D. Ga. Aug. 13, 2009); *Honig* v. *Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1285-1290 (N.D. Ga. 2008); *Lomax* v. *Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *McGinnis* v. *T-Mobile USA, Inc.*, 2008 WL 2858492, at *6 (W.D. Wash. July 22, 2008)
Hawaii	*Brown* v. *KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-167 & n.23 (Haw. 1996)

State	Case
Illinois	*Rosen* v. *SCIL, LLC*, 799 N.E.2d 488, 494-495 (Ill. App. Ct. 2003); *Franczyk* v. *Cingular Wireless LLC*, No. 03 CH 14203 (Ill. Cir. Ct. June 13, 2005); *Crandall* v. *AT&T Mobility, LLC*, 2008 WL 2796752, at *5 (S.D. Ill. July 18, 2008); *Harris* v. *DirecTV Group, Inc.*, 2008 WL 342973, at *5 (N.D. Ill. Feb. 5, 2008); *Pivoris* v. *TCF Fin. Corp.*, 2007 WL 4355040, at *6 (N.D. Ill. Dec. 7, 2007); *In re Jamster Mtkg. Litig.*, 2008 WL 4858506, at *4-*6 (Nov. 10, 2008), *amended on other grounds by* 2009 WL 250089 (S.D. Cal. Feb. 2, 2009)
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Maryland	*Walther* v. *Sovereign Bank*, 872 A.2d 735, 750 751 (Md. 2005); *Doyle* v. *Fin. Am., LLC*, 918 A.2d 1266, 1271 n.6 (Md. Ct. Spec. App. 2007); *Snowden* v. *Check-Point Check Cashing*, 290 F.3d 631, 638 639 (4th Cir. 2002); *Jones* v. *Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005); *In re Jamster Mtkg. Litig.*, 2008 WL 4858506, at *4-*6 (Nov. 10, 2008), *amended on other grounds by* 2009 WL 250089 (S.D. Cal. Feb. 2, 2009)

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Mississippi	*Anglin* v. *Tower Loan of Miss., Inc.*, 635 F. Supp. 2d 523, 528-530 (S.D. Miss. 2009); *Steed* v. *Sanderson Farms, Inc.*, 2006 WL 2844546, at *10 (S.D. Miss. Sept. 29, 2006); *In re Jamster Mtkg. Litig.*, 2008 WL 4858506, at *4 *6 (Nov. 10, 2008), *amended on other grounds by* 2009 WL 250089 (S.D. Cal. Feb. 2, 2009)
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State	Case
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OPPOSITION BRIEF

Supreme Court, U.S.
FILED
APR 26 2010
OFFICE OF THE CLERK

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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April 26, 2010

QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Class-action bans—contract provisions that deny the right to pursue classwide relief, whether through litigation or arbitration—are invalid in some circumstances under generally applicable state contract law. Is such state law preempted by the FAA when the class-action ban to which it is applied is embedded in an arbitration agreement?

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INTRODUCTION

In recent years, this Court has repeatedly denied petitions for certiorari raising the question presented here—including a previous petition arising out of this very litigation. *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008), No. 07-976. Just three months ago, in *Athens Disposal Company v. Franco*, 130 S. Ct. 1050 (2010), No. 09-272, the Court denied another petition on the question, and it should do the same here.[1]

Every federal circuit and every state supreme court to confront the question presented has held that the Federal Arbitration Act (FAA) does not preclude courts from striking down particular class-action bans as unconscionable under generally applicable state contract law. These courts include the First, Third, Ninth, and Eleventh Circuits, and the highest state courts of Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia. In light of that unanimity, the federal-preemption question is unimportant and unworthy of this Court's review.

AT&T's petition is even less certworthy than T-Mobile's recent petitions, which likewise relied on a purported conflict created by dicta in *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007). The Third Circuit has now made clear that it agrees with all of the other courts: So

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[1] Other recently denied petitions on the question presented include *T-Mobile USA, Inc. v. Janda*, 129 S. Ct. 45 (2008), No. 07-1331; *T-Mobile USA, Inc. v. Lowden*, 129 S. Ct. 45 (2008), No. 07-1330; *T-Mobile USA, Inc. v. Ford*, 128 S. Ct. 2503 (2008), No. 07-1103; *T-Mobile USA, Inc. v. Gatton*, 128 S. Ct. 2501 (2008), No. 07-1036; *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), No. 07-988; and *County Bank of Rehoboth Beach, Del. v. Muhammad*, 127 S. Ct. 2032 (2007), No. 06-907.

long as the defense of unconscionability is employed as "a general contract defense, one that applies to all waivers of class-wide actions, not simply those that also compel arbitration," then "there are no grounds for FAA preemption." *Homa v. American Express Co.*, 558 F.3d 225, 229-230 (3d Cir. 2009). AT&T also claims a conflict with *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001), but that case did not even discuss the question presented.

Finally, AT&T's petition relies heavily on the premise that this case involves a revised arbitration agreement that, among other things, permits recovery of attorneys' fees. While such a revision may be relevant to the state-law enforceability analysis, it has no bearing on FAA preemption, and AT&T cites no authority suggesting otherwise. But even if the revision did make a difference, as AT&T contends, this case is a poor vehicle to explore the question because AT&T's revised agreement was formulated and unilaterally imposed on the plaintiffs *after* this lawsuit was filed. As AT&T acknowledged below, the question whether the revised agreement applies under these circumstances is a "threshold question" of state contract law that is logically antecedent to the question presented. *Cf. Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (failing to reach question presented under the FAA in light of an antecedent question of state contract law). For this reason, too, the petition should be denied.

STATEMENT

This petition arises out of consolidated class actions brought by respondents Jennifer Laster, Andrew Thompson, Elizabeth Voorhies, Vincent Concepcion, and Liza Concepcion, against several cellular phone companies, including T-Mobile and AT&T. Respondents allege

that the phone companies, in violation of state consumer-protection laws, charged consumers sales tax on the full retail value of cellular phones that they advertised as "free."

1. Laster, Voorhies, and Thompson sued AT&T (then known as Cingular) and T-Mobile in May 2005. Both companies moved to compel arbitration and invoked class bans in their arbitration agreements. Relying on *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1110 (Cal. 2005), the district court determined in November 2005 that AT&T's and T-Mobile's class bans were unconscionable under generally applicable California contract law and that the FAA did not preempt that determination. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1192 (S.D. Cal. 2005).

AT&T and T-Mobile appealed. Before the appeal was decided, the Ninth Circuit held in another case that AT&T's class ban was unenforceable under California law and that the FAA did not preempt that holding. *Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 978 (9th Cir. 2007). In response, AT&T dropped its appeal. Pet. App. 26a. In T-Mobile's appeal, the Ninth Circuit followed *Shroyer* and affirmed the district court. *T-Mobile USA, Inc. v. Laster*, 252 Fed. Appx. 777 (9th Cir. 2007).

T-Mobile then filed a petition for certiorari on the FAA preemption issue, which this Court denied. *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (07-976). AT&T took the unusual step of filing an *amicus* brief recommending that the Court deny its co-defendant's petition. AT&T argued that review would be premature and unnecessary given the absence of a circuit split and would interfere with the ongoing evolution of class bans and the state law concerning their enforce-

ability. AT&T observed that the preemption issue was "certain to be much murkier than it would be in a case in which it is clear that the State has adopted an essentially per se rule against the enforcement of class waivers." AT&T Amicus Br. in *T-Mobile USA, Inc. v. Laster*, No. 07-976, at 6.

2. While the first appeal was pending, the district court granted AT&T's request to consolidate the ongoing litigation with an action filed in March 2006 by Vincent and Liza Concepcion, raising the same allegations against AT&T. The Concepcions first purchased their telephone service from AT&T in 2002. At the time they filed suit, their wireless service agreement included AT&T's then-standard arbitration clause, including the class ban. Pet. App. 19a-20a.

Nine months after the Concepcions filed suit, AT&T sought to unilaterally modify the terms of its contract with the Conceptions. Invoking a "change-in-terms" provision in its agreement, AT&T sent the Concepcions a notice of revision in the envelope containing their monthly bill. Pet. App. 20a. The notice included provisions under which AT&T would pay a California customer attorneys' fees and $7,500 (the amount of the maximum claim that could be brought in small claims court) if the arbitrator issued an award in favor of the consumer exceeding AT&T's last written settlement offer made before the selection of the arbitrator. Pet. App. 21-22a. It is unclear from the record whether the Concepcions actually received the notice.

In March 2008, AT&T moved to compel the Concepcions to arbitration. The plaintiffs argued that the applicable agreement was "the one that existed at the beginning of the lawsuit in March 2006," and had already been held unenforceable. Pet. App. 28a. Although the district

court found the revised agreement applicable, *id.* 28a-30a, the revision did not alter the outcome of its state-contract-law unconscionability analysis. Pet. App. 30a-46a. With respect to FAA preemption, the court adhered to its November 2005 decision, from which T-Mobile had previously appealed and petitioned for certiorari. *Id.* 47a n.11.

The Ninth Circuit again affirmed. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009). On appeal, AT&T acknowledged that, if the difference between the pre-2006 and post-2006 agreements would affect the outcome as it claimed, then the validity of the 2006 revision presented a "threshold question" of California law. AT&T Reply Br. in *Laster v. AT&T Mobility*, No. 08-56394 (9th Cir.) at 1. The Ninth Circuit concluded that AT&T's premium-payment and attorneys' fees clauses would not change the underlying value of the claims at issue or the analysis under *Discover Bank*. "The *Discover Bank* rule," the court explained, "focuses on whether damages are predictably small and, in the end, the premium payment provision does not transform a $30.22 case into a predictable $7,500 case." App. 9a-11a. The court also rejected AT&T's preemption theory, explaining that "*Shroyer* controls this case because AT&T makes the same arguments we rejected there." *Id.* 12a.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Concerning The Question Presented Because No Court Has Adopted AT&T's Theory of FAA Preemption.

AT&T asserts that the "[l]ower [c]ourts [a]re [d]ivided" and in "disarray" over "whether, and if so, when, the FAA preempts state-law limitations on class waivers in arbitration provisions." Pet. 17, 20. In fact, the lower courts are unanimous: No appellate court, state or

federal, has held that "the FAA preempts state-law limitations on class waivers in arbitration provisions." *Id.* AT&T attempts to create the illusion of a split in three ways—by failing to mention the accumulating body of cases addressing the question presented, relying on two cases that did not decide the question at all, and conflating the *federal-law* question of FAA preemption with the *state-law* question of enforceability under general contract law.

A. Every Court That Has Decided the Question Presented Has Reached the Same Conclusion.

Every federal circuit and state court of last resort to have decided the question has reached the same conclusion: The FAA does not preclude courts from striking down particular class-action bans under generally applicable state contract law.

The courts of last resort in at least nine states—Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia—have squarely reached that conclusion. *See Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008-09 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006); *Muhammad v. County Bank of Rehoboth, Del.*, 912 A.2d 88, 94-96 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007); *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1110-17 (Cal. 2005); *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

Intermediate courts in states including Missouri, Oregon, and Wisconsin have agreed.[2]

The federal circuits that have decided the question presented have come to the same conclusion. The First, Third, Ninth, and Eleventh Circuits have all held that the FAA does not preempt determinations that class-action bans are invalid under state law. *See, e.g., Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (New Jersey law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law), *cert. denied*, 129 S. Ct. 45 (2008); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57-59 (1st Cir. 2007) (Massachusetts law); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007) (California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law); *see also Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010) (certifying question whether a class ban is enforceable under Florida law to the Florida Supreme Court).

B. Neither The Third Circuit Nor the Tennessee Court of Appeals Have Created a Conflict.

Against the unanimous position of the many courts that have actually decided the question presented, AT&T pits two cases, one from the Third Circuit and the other from Tennessee's intermediate state court. Neither case creates a conflict, however, because neither case decided a question of FAA preemption of state contract law.

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[2] *See Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 746 (Wis. App. 2007), *review denied*, 737 N.W.2d 432 (Wis. 2007); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308, 310 (Mo. App. 2005).

1. AT&T's reliance on *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), echoes the principal argument made in T-Mobile's earlier petition in this litigation. *See* Pet. for Cert. in *T-Mobile USA, Inc. v. Laster*, No. 07-976. *Gay*, however, disposed of an unconscionability claim solely on the basis of *Virginia law*, not FAA preemption. 511 F.3d at 391-92. The opinion's discussion about the potential preemption of Pennsylvania law, which it had already determined to be inapplicable, was purely speculative and was based on an expansive reading of state trial-court rulings that have been discredited by the Pennsylvania Supreme Court. *Id.* at 392 (citing *Lytle v. CitiFinancial Services, Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002)); *see Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007) (concluding that *Lytle* "swept too broadly" and reflected an improper presumption in favor of unconscionability).

AT&T's petition is even less certworthy than T-Mobile's because the Third Circuit has now made clear that a determination that a class-action ban is unconscionable under generally applicable contract law is not preempted, and that *Gay* does not hold otherwise. *See Homa*, 558 F.3d at 229-230 ("The defense *Muhammad* provides [under New Jersey law] is a general contract defense, one that applies to all waivers of class-wide actions, not simply those that also compel arbitration. Therefore, there are no grounds for FAA preemption.") (relying on *Lowden v. T-Mobile*, 512 F.3d 1213).

Undeterred, AT&T speculates that the Third Circuit might follow *Gay*'s dicta "the next time a case governed by Pennsylvania law is before it." Pet. 19. That speculation entirely overlooks recent Third Circuit decisions upholding arbitration agreements containing class-action bans under Pennsylvania law. *See, e.g., Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009)

("We have little difficulty concluding that Kaneff's agreement to arbitrate would not be considered unconscionable under Pennsylvania law."); *see also Cronin v. CitiFinancial Services, Inc.*, 352 Fed. Appx. 630, 635 (3d Cir. 2009) (describing *Gay*'s discussion of Pennsylvania law as dicta and "conclud[ing] that the class action waiver provision in the parties' arbitration agreement is not unconscionable under Pennsylvania law.").

2. AT&T's reliance on the nine-year-old decision of the Tennessee Court of Appeals in *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001), is even further afield. *Pyburn* did not touch on the question presented. The plaintiff in *Pyburn* claimed that a class-action ban was inconsistent with a *state statute* (the state's consumer-protection law), not a generally applicable contract-law defense. The Tennessee court resolved that challenge entirely on state-law grounds, finding no inconsistency with the state statute. *Id.* at 354.

In the passage upon which the petition seizes, the court went on to speculate that "[e]ven if we were to conclude that the Tennessee Legislature specifically intended" to preclude class bans in arbitration, federal law "would" bar invalidation of the agreement on that basis. *Id.* at 365. The court properly noted that enforceability of an arbitration agreement under FAA section 2 depends on whether the agreement is in a written contract involving commerce and whether it is subject to revocation under general state contract law. *Id.* at 364-65. Because the plaintiff invoked none of these grounds, his claim failed. *Id.* at 364 ("In our opinion, whether the unavailability of class action relief would violate the intent of a State legislature is not a relevant consideration . . . under the FAA.").

Pyburn, in short, created no conflict on the question presented because it did not discuss the question at all. Whether the FAA would have barred a hypothetical Tennessee statute that had the effect the plaintiff claimed is an entirely separate question from whether the FAA trumps the application of general contract law. Accordingly, neither of the two cases cited by AT&T support its claim of a split, much less the "disarray" of which AT&T complains. Pet. 20.

C. AT&T's Petition Conflates the Federal Question of Preemption with the State-Law Question of Enforceability Under Generally Applicable Contract Law.

In addition to distorting *Gay* and *Pyburn*, AT&T's petition repeatedly attempts to create the illusion of a conflict by conflating the federal-law question of FAA preemption with the state-law question of enforceability under generally applicable contract law. The petition thus leaps from statements describing the issue of the enforceability of class bans under *state law* as "hotly contested" and "important" to the conclusion that the preemption question under *federal law* is hotly contested and important. Pet. 24. But when nine state supreme courts and four federal appellate courts over nearly a decade have consistently rejected a particular legal theory, and no courts have reached the opposite conclusion, one cannot sensibly describe that legal theory as hotly contested or sufficiently important to warrant this Court's review.

Along similar lines, AT&T's petition includes an appendix that supposedly demonstrates that most states would uphold its class-action ban, thus suggesting that the decision below is an outlier. Pet. App. 63a-69a. But the decisions are grouped based only on *state-law* en-

forceability determinations, not federal preemption. Moreover, the appendix is highly selective, relying chiefly on unpublished federal district-court decisions and citing many cases that did not involve unconscionability challenges at all. Most of the states listed in AT&T's appendix are those in which the state's highest court has decided neither the enforceability nor the preemption question. Finally, the appendix lists Alabama, Georgia, Illinois, and West Virginia, omitting binding state supreme court and federal appellate precedent squarely holding that the FAA does not preempt those state's determinations that particular class-action bans are unconscionable. *See Leonard*, 854 So. 2d at 535-36; *Dale*, 498 F.3d at 1219; *Kinkel*, 857 N.E.2d at 260-631; *Dunlap*, 567 S.E.2d at 272 n.3.

Faced with the complete absence of a conflict on the question presented, AT&T falls back on a prediction that the development of "disagreement among the lower courts is highly unlikely." Pet. 21. But absent a split, that concession is a sound reason to deny the petition—not to grant it.

AT&T speculates that courts "generally would have no need to reach the FAA preemption issue unless they first were to conclude that the applicable state law would bar enforcement of the arbitration provision." *Id.* In fact, a large number of appellate courts have addressed the preemption issue precisely because they have found particular class bans unconscionable. And, in any event, courts frequently address the FAA preemption issue *before* resolving the state-law unconscionability issue. *See Pendergast*, 592 F.3d at 1113 & n.13 (explaining that Florida law controls and that the FAA permits the plaintiff to challenge a class-action ban under the generally applicable contract-law defense of unconscionability, without deciding enforceability); *Kinkel*, 857 N.E.2d at

260 ("If plaintiff's claim is preempted by federal law, we need go no further in our analysis of the class action waiver."); *Muhammad*, 912 A.2d at 96 ("Because federal arbitration law does not prevent us from examining the validity of the class-arbitration waiver, we turn then to our state law requirements in respect of contract unconscionability.").

Contrary to what AT&T says, then, there *is* good reason to expect that the steady stream of appellate decisions on the FAA preemption question will continue. Unless and until one of those decisions actually agrees with AT&T's preemption theory, however, the question presented will remain unworthy of this Court's review.

II. This Case Is a Poor Vehicle to Address the Question Presented.

AT&T claims that this case is "a better vehicle for resolving the preemption issue" than the petitions in *Laster* and *Lowden* (in which the Court recently denied certiorari) because the arbitration agreements in those cases "did not allow for recovery of statutory attorneys' fees." Pet. 16 n.7. Indeed, AT&T's preemption theory rests on its view that the distinction between the two types of arbitration agreements makes a difference to the FAA preemption question. That view is wrong. Although the claimed fairness of AT&T's arbitration agreement (which the Ninth Circuit explained is illusory) may be pertinent to whether it is in fact unconscionable under state contract law, it has no bearing on whether the FAA preempts a finding that a class ban is unconscionable under state contract law, and AT&T cites no authority even suggesting that such factors bear on the preemption analysis.

But even if AT&T's supposedly new and improved agreement could somehow make a difference to the pre-

emption analysis, this would not be the proper case in which to explore the question because of the lingering and unresolved state-law question whether the new agreement even applies to this case. At the time the Conceptions filed suit in March 2006, the arbitration agreement in place did not allow for the recovery of statutory attorneys' fees. Nine months later, AT&T sent the Conceptions a bill stuffer purporting to revise the agreement to include the attorney-fee provision. The notice stated that "[c]ustomers whose contracts include arbitration provisions that differ from this current arbitration provision, may, of course, arbitrate pursuant to the terms of those contracts if they prefer to do so." Pet. App. 56a. The notice did not inform customers that any action was necessary if they "prefer[red]" not to accept the new terms. *Id.*

Both in the district court and the Ninth Circuit, the plaintiffs argued that, as a matter of California law, the agreement in place at the time the suit was filed was the applicable agreement. Pet. App. 28a-30a. On appeal, AT&T acknowledged that, because AT&T believed the difference between the pre-2006 and post-2006 agreements should affect the outcome, the validity of the 2006 revision presented a "threshold question" of California law. AT&T Reply Br. in *Laster v. AT&T Mobility*, No. 08-56394 (9th Cir.) at 1. The Ninth Circuit concluded that the revision did not alter its state-law enforceability or FAA-preemption analysis. Pet. 9a-11a, 12a-16a.

The California Supreme Court has not resolved the question whether and to what extent a post-litigation bill stuffer can be used to alter the rights of parties to pending litigation. Below, AT&T relied on dicta in two California cases. *See* AT&T Reply Br. at 1 (citing *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273 (Cal. App. 1998); *Gregory v. Spring Spectrum L.P.*, 2006 WL 2497781 (Cal. Ct.

App. 2006)). But those cases, both of which held that the purported modifications at issue did *not* govern the disputes in litigation, actually support the plaintiffs' position. *Badie*, for example, made clear that "a party with the unilateral right to modify a contract" does not have "carte blanche to make any kind of change whatsoever as long as a specified procedure is followed." 79 Cal. Rptr. 2d at 281. The court concluded that the modified contract did not apply because, among other things, "the 'bill stuffer' itself is far from the direct, clear and unambiguous language required" and that the language "[i]f you or we request" made the contract modification sound like an option. *Id.* at 290. The language of the bill stuffer here was even more ambiguous; it asserts that customers can rely on the terms of the old contract if they "prefer."[3]

It is at best unclear under California law whether AT&T's revised agreement is applicable in this case. Accordingly, even on AT&T's own terms, this case is a poor vehicle to explore the question presented because it presents an antecedent question of state contract law—namely, which arbitration clause is applicable to the dispute—that could preclude the Court from reaching the question as AT&T has framed it. *Cf. Green Tree Finan-*

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[3] Other decisions also support the conclusion that the pre-suit agreement applies. *See, e.g., Long v. Fidelity Water Sys., Inc.*, 2000 WL 989914, at *3 (N.D. Cal. 2000) (refusing to apply purported contract modification that postdated the litigation in part because the consumer was "a putative class member at the time defendants' communication with him," which "weakens any argument that he knowingly and voluntarily" agreed to the provision). The attempted unilateral modification of a consumer contract in the context of a pending class action may also run afoul of Rule 23. *See In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 569-70 (S.D.N.Y. 2004) (attempted contract modification constituted prohibited communication to parties without court supervision).

cial Corp. v. Bazzle, 539 U.S. 444 (2003) (failing to reach question presented under FAA in light of an antecedent question of South Carolina contract law).

III. AT&T's Claim of a Conflict with This Court's Precedent Restates Its Mistaken Preemption Theory, Which Has Not Been Adopted By Any Court.

In the absence of a conflict among the lower courts, AT&T argues that certiorari is warranted because the decision conflicts with "this Court's FAA jurisprudence." Pet. 25. AT&T's assertion of a conflict, however, merely restates its theory on the merits of the preemption issue—a theory that has thus far attracted no takers.

As AT&T acknowledges (at 27), the plain text of the FAA makes arbitration agreements enforceable "save upon such grounds as exist in law or equity for the revocation of any contract." 9 U.S.C. § 2. Under that savings clause, "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The Court has consistently held that the FAA requires that arbitration clauses be placed on an *equal* footing with other contracts: "States may regulate contracts, including arbitration clauses, under general contract law principles," but they may not discriminate against arbitration clauses. *Id.* at 686. Under that approach, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 491 n.9 (1987) (emphasis in original). "[A] state-law principle that takes its meaning precisely from the fact that a

contract to arbitrate is at issue," however, "does not comport" with the FAA. *Id.*

The state-law principles applied by the decision below do not depend on or take their meaning from the fact that the contract concerns arbitration. Rather, "[t]he California Supreme Court in *Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration." *Shroyer*, 498 F.3d at 990 (emphasis in original). As the Washington Supreme Court has explained, the FAA requires courts "to put arbitration clauses on the *same* footing as other contracts, not to make them special favorites of the law." *Scott*, 161 P.3d at 1008 (emphasis added). Because the law of states such as California, Illinois, New Jersey, and Washington with respect to exculpatory clauses applies regardless of whether a class ban is found in an arbitration agreement or some other contract, it does not run afoul of the FAA: "The arbitration clause is irrelevant to the unconscionability." *Id.* Exculpatory clauses "do not change their character merely because they are found within a clause labeled 'Arbitration.'" *Id.*

Contrary to AT&T's suggestion, neither California nor any other state has erected a per se rule that class-action bans are unenforceable; rather, state law calls for a fact-specific inquiry that applies equally to class bans located in arbitration clauses and those located in other types of contracts. The even-handed approach of the state law applied in the decision below is demonstrated by the fact that, under California law, a class ban found in a contract that does *not* contain an arbitration clause may likewise be held unenforceable if it would operate to exculpate wrongful behavior. *See Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712-13 (Cal. Ct. App. 2001) (forum selection clause). Under *Discover*

Bank, California courts continue to assess enforceability on a case-by-case basis and may either enforce or invalidate class bans in arbitration clauses, based on the facts of the case. *Compare Discover Bank*, 113 P.3d at 162-63 (class ban unenforceable) *with Citibank (South Dakota), N.A. v. Walker*, 2008 WL 4175125, at *6 (Cal. Ct. App. 2008) (class ban enforceable). Federal district courts have also applied the fact-specific inquiry under California law to enforce class bans in arbitration clauses where they do not operate as unconscionable exculpatory clauses.[4]

The same even-handed approach is followed by the other states that have found some class bans unenforceable. For example, the New Jersey Supreme Court issued two decisions the same day reaching different conclusions concerning the enforceability of class bans found two different arbitration clauses, based on the different circumstances presented by those cases. *Compare Muhammad*, 912 A.2d 88 (class ban unenforceable), *with Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006) (class ban enforceable). Similarly, on the same day that it issued a decision striking down a class ban in an arbitration clause in *Scott*, 161 P.3d 1000, the Washington Supreme Court held unenforceable a forum selection clause

[4] *See, e.g., Smith v. Americredit Fin. Servs., Inc.*, 2009 WL 4895280, at *6-*8 (S.D. Cal. 2009); *Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1027 (E.D. Cal. 2009); *McCabe v. Dell, Inc.*, 2007 WL 1434972, at *3 -*4 (C.D. Cal. 2007); *Torres v. Chrysler Fin. Co.*, 2007 WL 3165665, at *2-*3 (N.D. Cal. 2007). Courts have likewise enforced class-action bans in agreements governed by the law of other states after concluding that the class-action bans were not unconscionable under California law. *See, e.g., Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1270 (C.D. Cal. 2008); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1203 (C.D. Cal. 2006); *Lux v. Good Guys, Inc.*, 2006 WL 357820, at *1 (C.D. Cal. 2006).

in a non-arbitration agreement that had the effect of barring class actions. *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007).

At bottom, the hostility to arbitration in this case is AT&T's, not California's. Decisions such as *Discover Bank* and *Shroyer* do not foreclose arbitration unless an unenforceable class-action ban is inseverable from the arbitration agreement. Indeed, courts have severed unconscionable class bans and compelled arbitration under the remaining contract. *See Indep. Ass'n of Mailbox Center Owners, Inc. v. Superior Court*, 34 Cal. Rptr. 3d 659, 676 (Cal. Ct. App. 2005); *see also IJL Dominicana S.A. v. It's Just Lunch Int'l, LLC*, 2009 WL 305187, at *5-*6 (C.D. Cal. 2009). Thus, unconscionability rulings are neutral as to whether classwide proceedings take place in arbitration or in court—the answer depends on the parties' agreement. In this case, proceeding via litigation rather than arbitration was AT&T's choice. AT&T, not California law, determined that if it could not enforce its class-action ban, it would prefer to proceed in court.

Even counsel for one of AT&T's *amici* (DRI) has taken the position that "the FAA does not preempt any state-court decisions holding a [class-action ban] unconscionable as long as the decision is an objectively reasonable application of state unconscionability law." Jack Wilson, *"No-Class-Action Arbitration Clauses," State Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 Quinnipiac L. Rev. 737, 741 (2004). To the extent that AT&T is asking this Court to decide whether the California Supreme Court and the highest courts of at least eight other states are saying one thing and doing another, its petition runs up against a core principle of federalism—that federal courts should not second-guess

a state high court's articulation of the state's own law. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Because "state courts are the ultimate expositors of state law," this Court is "bound by their constructions except in extreme circumstances," such as "obvious subterfuge." *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975). Surely nine state supreme courts (and four federal circuits) are not all guilty of outright subterfuge.

The last time this Court granted a petition that involved an effort to second-guess a state court's application of state law, the difficulties of the enterprise forced the Court to dismiss the writ as improvidently granted. *See Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436 (2009). The Court should avoid a similar waste of its resources in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER[1]

Respondents do not take issue with most of the points made in the Petition and the four supporting amicus briefs. Specifically:

- They do not dispute that, as a result of the decision below and others like it, tens (if not hundreds) of millions of arbitration provisions governed by the FAA are unenforceable under California law. See Pet. 17-19; CTIA Br. 12-13; DRI Br. 18-19 n.4.
- They do not dispute that both courts below found that respondents would be "essentially guarantee[d]" to obtain make-whole relief (if not more) were they to invoke AT&TM's arbitration process and invalidated AT&TM's arbitration provision *solely* because it precludes respondents from seeking to vindicate the unasserted claims of *other* customers. See Pet. App. 9a-11a & n.9, 37a-46a.
- They do not dispute that, because "no arbitration provision * * * is more pro-consumer than AT&TM's, * * * there is little, if anything, left for businesses to do in the way of creating additional 'incentives' to arbitrate" (DRI Br. 23) and that companies therefore are apt to conclude "that they will never be able to design an arbitration agreement that satisfies courts in some economically important jurisdictions" (Chamber of Commerce Br. 14 n.6).

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[1] The Rule 29.6 Statement in the Petition remains accurate.

- They do not dispute that the vast majority of courts outside of California and the Ninth Circuit have rejected state-law attacks on provisions requiring traditional, bilateral arbitration when, as here, the provisions neither limit remedies nor impose undue costs on the plaintiff. Indeed, they point out that Pennsylvania has joined the list (see Opp. 8-9), leaving one fewer jurisdiction in which the preemption issue presented here could conceivably arise and making it all the more clear that there is no point to waiting for a deeper split to develop.

- They do not dispute that class-wide arbitration is such an unpalatable hybrid that few, if any, businesses would knowingly agree to it. See Pet. 32-34; DRI Br. 9-18; CTIA Br. 17-18. That point, of course, has now been expressly endorsed by this Court. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, No. 08-1198, slip op. 21-23 (Apr. 27, 2010).

- And they do not dispute our showing (Pet. 31-32)—and that of the amici—that California has thoroughly distorted its law of unconscionability in order to invalidate contracts requiring the arbitration of disputes on an individual basis. See DRI Br. 4-9; Chamber of Commerce Br. 16-23; PLF Br. 10-19.

These unrefuted points establish both the importance of the issue presented by the Petition and the irreconcilability of the decision below with the FAA and the decisions of this Court. The arguments respondents do make fail to justify allowing this issue to continue to go unresolved.

A. *Stolt-Nielsen* Confirms That The Decision Below Is Irreconcilable With The FAA And This Court's Precedents.

The issue in *Stolt-Nielsen* was whether an arbitration provision that is "silent" on the subject may be construed to permit class-wide arbitration. The Court began its analysis by observing that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." Slip op. 17 (internal quotation marks omitted). Reiterating what it has said "on numerous occasions," the Court explained that "the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Id.* at 18 (internal quotation marks omitted). In other words, under the FAA "parties are generally free to structure their arbitration agreements as they see fit," including by "agree[ing] on rules under which any arbitration will proceed." *Id.* at 19 (internal quotation marks omitted).

The Court reasoned from these established principles that parties also "may specify *with whom* they choose to arbitrate their disputes." *Ibid.* It follows, the Court concluded, "that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 20. In short, the arbitration panel's contrary conclusion was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Ibid.*

Finally, the Court explained that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed [that] the par-

ties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 21. Indeed, the Court declared, the "changes brought about by the shift from bilateral arbitration to class-action arbitration"—including the loss of cost savings and efficiency associated with bilateral arbitration and the magnified stakes of class-wide arbitration—are "fundamental." *Id.* at 21-23. Accordingly, it concluded, "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 23.

Stolt-Nielsen strongly supports our contention that the FAA preempts California from refusing to enforce provisions that require traditional, bilateral arbitration when, as here, it is fully realistic for plaintiffs to vindicate their claims on an individual basis. After all, if the FAA precludes arbitrators from conducting class-wide arbitration when the parties' agreement is silent on the subject, it follows inexorably that the FAA also precludes States from requiring parties to submit to class-wide proceedings as the price of obtaining admission to the arbitral forum.

Moreover, in reaffirming that "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms'" (*id.* at 18), *Stolt-Nielsen* supports our argument that the FAA preempts States from dictating the procedures that apply in arbitration at least when, as here, such procedures are not necessary to ensure that the parties can vindicate their claims. See Pet. 26-30.

Finally, in acknowledging "the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration" (slip op. 22), *Stolt-Nielsen* reinforces our point that, if faced with the choice between exposing themselves to the risk of a class-wide arbitration or giving up on arbitration entirely, businesses will unfailingly choose the latter course, an outcome that is inimical to the purposes of the FAA. See Pet. 32-34.

In short, *Stolt-Nielsen* confirms that the decision below is out of step with this Court's precedents. That is reason enough for this Court to grant certiorari.

B. The Issue Presented Is Of Exceptional Importance.

We showed in the Petition that the question presented here is important because California law, as construed by the Ninth Circuit, has the effect of invalidating tens, if not hundreds, of millions of provisions that require traditional, bilateral arbitration. Respondents do not deny that the rule endorsed by the Ninth Circuit will have this broad impact.[2] Nor

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[2] Respondents do deny that the Ninth Circuit's approach amounts to an across-the-board condemnation of provisions requiring bilateral arbitration. Opp. 16-17. But all except one of the federal district court cases they cite pre-date the Ninth Circuit's decision. And that decision—*Smith* v. *Americredit Financial Services, Inc.*, 2009 WL 4895280 (S.D. Cal. Dec. 11, 2009)—was promptly appealed. Meanwhile, the lone state-court case they cite—*Citibank (South Dakota), N.A.* v. *Walker*, 2008 WL 4175125 (Cal. Ct. App. Sept. 11, 2008)—is non-precedential, pre-dates the Ninth Circuit's decision, and, in any event, turned on waiver and the plaintiff's failure to "allege any viable class action claims" (*id.* at *4).

do they deny that the Ninth Circuit has drastically expanded the reach of California law by applying it to all claims involving either a California-based business or a California customer without regard to the law chosen in the parties' contract.

Respondents nonetheless contend that the issue presented is "unimportant," because, they say, all federal courts of appeals and state supreme courts to reach the issue have held that the FAA does not preempt state unconscionability law. As we discuss in the next section, they are mistaken about that, but even if they were right about the case law, that does not mean either that the issue is "unimportant" or that review is unwarranted.

An issue may be important even in the absence of a conflict among the lower courts. See, *e.g.*, *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 698 (2010) (Court granted certiorari "[b]ecause of the importance of the issue"); *Suenz* v. *Roe*, 526 U.S. 489, 498 (1999) (Court granted certiorari despite unanimity of courts of appeals on the issue "because of the importance of the case"); *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 519 (1998) (same); *Missouri* v. *Jenkins*, 515 U.S. 70, 83 (1995) (same).

Indeed, this Court has granted review in other arbitration cases in which there either was no split or the issue was of materially less significance than the one presented here. See *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Stolt-Nielsen*, *supra*; *Rent-A-Center West, Inc.* v. *Jackson*, No. 09-497 (argued Apr. 26, 2010).

C. Respondents' Assertion That There Is No Disarray In The Lower Courts Is Mistaken.

In response to our contention that the lower courts are in disarray regarding the issue presented here, respondents assert that (i) every federal court of appeals, state supreme court, and intermediate state appellate court to reach the issue has held that the FAA does not preempt States from refusing to enforce provisions that require traditional, bilateral arbitration; (ii) no case holds otherwise; and (iii) our showing that such provisions are fully enforceable under the laws of most States is beside the point. They are mistaken in each respect.

To begin with, by mischaracterizing our preemption argument, respondents overstate the number of courts that have rejected it. Our position is that the FAA preempts a State's preference for class actions when, as here, the parties have agreed not to permit class arbitration *and* the plaintiff is fully able to vindicate his or her claims in a bilateral arbitration.[3] It

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[3] Accordingly, respondents are simply wrong in asserting that the fact that both courts below found that customers are able to vindicate their claims on an individual basis under AT&TM's 2006 arbitration provision "has no bearing on whether the FAA preempts a finding that a class ban is unconscionable under state contract law" (Opp. 12). Their misunderstanding of our preemption argument also underlies their mischaracterization of AT&TM's amicus brief in *T-Mobile USA, Inc.* v. *Laster*, 128 S. Ct. 2500 (2008). See Opp. 3. For the same reason, respondents' invocation of the denial of certiorari in *Laster* and several other pre-*Stolt-Nielsen* cases (Opp. 1) misses the point. None of those cases involved a "third generation" arbitration clause (see DRI Br. 21-22) like AT&TM's that ensures that plaintiffs can resolve their disputes on an individual basis.

is *not* our position that the FAA categorically preempts state unconscionability law or categorically precludes States from refusing to enforce provisions requiring bilateral arbitration when other features of those provisions make it unrealistic to vindicate claims on an individual basis. The overwhelming majority of the cases cited by respondents do no more than reject these broadest of preemption arguments (and several do not mention preemption at all). Only a few arguably hold that the FAA *never* preempts States from applying unconscionability doctrine to invalidate a provision requiring bilateral arbitration.[4]

On the other side of the ledger, respondents dismiss as "purely speculative" the Third Circuit's statement in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), that the FAA would preempt Pennsylvania cases striking down provisions requiring bilateral arbitration. Opp. 8. But as respondents admit, the Third Circuit has now twice held that such provisions are not unconscionable under Pennsylvania law, so *Gay* is likely to be the Third Circuit's last word on whether the FAA would preempt a contrary interpretation of Pennsylvania law.

And it is only by giving it a hypertechnical reading that respondents can claim that *Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001), does not conflict with the decision below.[5] In

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[4] See *Homa* v. *Am. Express Co.*, 558 F.3d 225 (3d Cir. 2009); *Feeney* v. *Dell Inc.*, 908 N.E.2d 753 (Mass. 2009); *Fiser* v. *Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008).

[5] As we pointed out in the Petition (at 21) and respondents do not dispute, *Pyburn* is the functional equivalent of a decision of the Tennessee Supreme Court.

Pyburn, the Tennessee Court of Appeals held that any state-law preference for allowing claims under the Tennessee Consumer Protection Act to be brought as class actions must give way to the FAA's policy favoring enforcement of arbitration provisions as written. *Id.* at 365. The fact that Tennessee's preference for class actions may have been embodied in positive law rather than the common law of contracts made no difference to the holding, as a federal district court in Tennessee recently concluded. See *Ambrose* v. *Comcast Corp.*, 2010 WL 1270712, at *4 (E.D. Tenn. Mar. 31, 2010) (rejecting unconscionability challenge to provision requiring bilateral arbitration and citing *Pyburn*).

Respondents also overlook *Wince* v. *Easterbrooke Cellular Corp.*, 2010 WL 392975 (N.D. W. Va. Feb. 2, 2010). In that case, the district court held that, in light of the incentives it creates to pursue arbitration on an individual basis, AT&TM's arbitration provision "cannot be deemed unfair" and hence unconscionable under West Virginia law. *Id.* at *4. The court went on to hold that "a broad reading" of West Virginia law "that sweepingly invalidates arbitration provisions containing class waivers, no matter the remaining incentives to arbitrate, would stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress in enacting the FAA and would be preempted under the doctrine of conflict preemption." *Id.* at *5 (internal quotation marks and alterations omitted). Although obviously not a decision of a federal court of appeals, *Wince* disproves respondents' assertion that the courts have uniformly rejected our preemption argument.

Finally, respondents miss the point of our showing that provisions that require bilateral arbitration

are fully enforceable under the law of most States when, as here, the provisions create adequate incentives to pursue arbitration on an individual basis. While the cases so holding may not technically be in conflict with the Ninth Circuit on the preemption issue, their *result* is absolutely irreconcilable with that of the Ninth Circuit. As a practical matter, the Ninth Circuit's decision means that the very same provision is enforceable in most States but unenforceable in California and possibly other States within that Circuit. This is the kind of Balkanization that Congress plainly intended to overcome when it enacted the FAA.

Moreover, the fact that AT&TM's provision or ones less consumer-friendly than that provision have been upheld under the laws of most States means that there is a greatly diminished universe in which the preemption issue can arise.[6] In the Petition, we argued that the issue might arise in, at most, seven States. But as respondents point out, the Third Circuit has upheld less consumer-friendly arbitration clauses than AT&TM's under Pennsylvania law and appears to have held that New Jersey law is not preempted, reducing to five the number of States in

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[6] Respondents say that it is just as likely that courts would reach preemption before turning to state-law issues (Opp. 11), but it is a rule of long standing that federal courts will first seek to decide issues on state-law grounds in order to avoid reaching constitutional issues unnecessarily. See, *e.g.*, *Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909). Indeed, a federal court recently refused to consider preemption precisely because it had concluded that AT&TM's arbitration provision was fully enforceable under state law. See *Moffatt* v. *Cingular Ameritech Mobile Commc'ns Inc.*, 2010 WL 451033, at *3 (E.D. Mich. Feb. 5, 2010).

which the preemption issue might still conceivably arise. That is not enough to make it worthwhile to await a deeper split.

D. This Case Is An Ideal Vehicle For Deciding The Issue.

Respondents do not deny that AT&TM's arbitration clause is more consumer-friendly than any other such provision in existence. Nor do they take issue with the Chamber of Commerce's observation that "[b]ecause of the extremely pro-consumer terms of the AT&T Mobility arbitration agreement * * *, this case presents an ideal starting point for the Court in this area; it can rule on the preemptive effect of the FAA without the need to test the limits of how far state law may go in invalidating contracts less favorable to the party claiming 'unconscionability.'" Chamber of Commerce Br. 3-4.

Respondents instead contend that this case is a poor vehicle because there supposedly is a "lingering and unresolved state-law question whether the new agreement even applies to this case." Opp. 13. That contention is a fluorescent red herring. The district court expressly held that, under California law, AT&TM validly modified its arbitration provision and that the 2006 version was the applicable one, rejecting each of the arguments that respondents resurrect here. See Pet. App. 28a-30a. The Ninth Circuit then implicitly accepted the district court's reasoning by proceeding directly to determine whether the 2006 provision is unconscionable under California law. Acknowledging that this case presents "a new wrinkle," namely the $7,500 premium payment provided for under the 2006 provision (*id.* at 2a), the Ninth Circuit went on to explain why the requirement of bilateral arbitration was unenforceable notwithstand-

ing this new wrinkle (*id.* at 9a-11a). As a consequence, its holdings as to both state-law unconscionability and FAA preemption govern all future cases in the Ninth Circuit involving ATTM's 2006 provision and its functionally identical 2009 successor. In these circumstances, there is no lingering issue of state law to be decided. As the case comes to this Court, that issue is definitively resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates regularly employ agreements to arbitrate in their business contracts with their customers and employees. By agreeing to arbitrate with their counterparties, they avoid costly and time-consuming litigation when disputes arise. In its place, they adopt a dispute resolution mechanism that is speedy, fair, inexpensive, and effective. Based on the legislative policy reflected in the Federal Arbitration Act and this Court's consistent endorsement of arbitration over the past several decades, Chamber members have

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both petitioner and respondents received timely notice of *amicus*'s intent to file the brief, and consented to it.

structured millions of contractual relationships around arbitration agreements.

A class-action waiver is a key component of many Chamber members' arbitration agreements. Decisions like the opinion below, which invalidated a class-action waiver in an arbitration agreement, frustrate the parties' intent, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation. Because so many of the advantages of arbitration would be lost if the Ninth Circuit's decision were allowed to stand, the Chamber has a strong interest in review by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's ruling is the latest in a growing line that invalidates class-action-waiver clauses in arbitration agreements as "unconscionable" under California law. *See, e.g.*, *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100 (Cal. 2005). The cases in this line all rest on a new conception of unconscionability, one that grants courts the power to strike down contracts because of a perceived injustice to non-parties, even when the agreements are unquestionably equitable as between the parties themselves. As the Ninth Circuit's latest ruling demonstrates, California's new conception of unconscionability doctrine even extends to invalidate contracts (like AT&T Mobility's arbitration agreement) that incontrovertibly favor the party with less bargaining power.

This approach to unconscionability does not comport with the Federal Arbitration Act (FAA),

9 U.S.C. §§ 1 *et seq.*, which requires that arbitration agreements be enforced according to their terms. A court may disregard or invalidate an arbitration agreement only if the agreement could be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Ninth Circuit's decisions in this area have put it at odds with the Supremacy Clause and, unsurprisingly, with many federal and state courts. Of more practical concern, manipulating the unconscionability doctrine to invalidate class-action waivers threatens to rob companies and consumers alike of the benefits of arbitration that the FAA was intended to safeguard and promote.

1. Given the consequences of the Ninth Circuit's ruling, this Court need not and should not await further disagreement among courts to address the power of the States to invalidate class-action waivers in arbitration agreements. Individual arbitration serves the needs of consumers in a way that class actions cannot. If even one jurisdiction—especially a jurisdiction as large as California—invalidates individual arbitration agreements simply because they *are* individual arbitration agreements, the costs to consumers of goods and services will increase, while their ability to obtain full and speedy redress for their injuries will decrease. Companies, for their part, will lose the certainty and efficiency that comes with having a single set of rules applicable to disputes with all consumers. Because of the extremely pro-consumer terms of the AT&T Mobility arbitration agreement at issue in this dispute, this case presents an ideal starting point for the Court in this area; it can rule on the preemptive effect of the FAA without the need to test the limits of how far state law may go in invalidating

contracts less favorable to the party claiming "unconscionability."

II. The Ninth Circuit's decision and the California decisions it follows conflict with the FAA. The particular brand of unconscionability the California courts have crafted for arbitration agreements with class action waivers is not the sort the FAA respects. The Court should grant certiorari to correct the Ninth Circuit's misunderstanding of Section 2 of the FAA.

ARGUMENT

I. A Decision From This Court Reviewing A Class-Action Waiver In An Arbitration Clause Is Necessary To Prevent Harm To Companies And Consumers, And This Case Is The Ideal Vehicle

Most state and federal courts disagree with California and the Ninth Circuit about the validity of class action waivers in arbitration agreements. See *Spann* v. *American Express Travel Related Servs. Co.*, 224 S.W.3d 698, 715 (Tenn. Ct. App. 2006) (stating that "the overwhelming majority view on this issue" is that agreements to arbitrate individually are enforceable); Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775, 776-777 (2005); Pet. App. 63a-69a (listing cases). Despite the disagreement of other courts, California has given no indication that it will conform, and the Ninth Circuit seems to believe that other States should or will follow California's rule rather than the majority rule. See *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1218-1219 (9th Cir.), cert. denied, 129 S. Ct. 45 (2008). Although different States of course are al-

lowed to have different unconscionability doctrines as a general proposition, something is deeply suspect when case law generates conflicts over an arbitration-specific question, not traceable to any non-arbitration doctrinal difference between the States reaching different outcomes.

A decision in this area is necessary to ensure that California and the Ninth Circuit appropriately construe the preemptive force of the FAA. By preventing those courts from distorting California's generally applicable unconscionability doctrine in order to target arbitration agreements, this Court will also protect the benefits individual arbitration provides to companies and consumers alike. Moreover, a decision reversing the Ninth Circuit will reduce the likelihood that other jurisdictions will take a similarly unconstrained approach to the interpretation of the standard contract doctrines of other States when deciding arbitration cases.

The extremely consumer-friendly provisions of AT&T Mobility's arbitration agreement (Pet. 6–10) make this case a particularly good vehicle for clarifying the limits of the contract defenses available under Section 2. AT&T Mobility's arbitration agreement does not "shock the conscience" or share any of the characteristics that would be required for California to deem a contract unconscionable in any other context, bringing into sharp relief the discriminatory treatment California and the Ninth Circuit give to arbitration agreements containing class-action waivers. The Ninth Circuit may believe it has done consumers a good turn by striking down AT&T Mobility's arbitration agreement, but it likely has left them worse off.

A. Individual Arbitration Lowers Dispute Resolution Costs And Resolves Problems Class Actions Cannot

1. There should no longer be any question that individual arbitration benefits both companies and consumers. Most immediately, arbitration provides consumers with "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280–281 (1995), and helps them avoid the "delays, expense, uncertainties, loss of control, * * * and animosities that frequently accompany litigation," Y2K Act, Pub. L. No. 106-37, §§ 2(a)(3)(B)(iv), 2(b)(3), 113 Stat. 185, 186–187 (1999) (encouraging businesses and users of technology to use "alternative dispute mechanisms" to avoid "costly and time-consuming litigation"); see also Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 767 (2003) ("Arbitration is also less expensive than litigation.").

In addition, through arbitration, consumers benefit from a greater flexibility in achieving the resolution of their claims than courts can provide. Under the American Arbitration Association's (AAA) rules for consumer disputes, "[t]he arbitrator may grant any remedy, relief or outcome that the parties could have received in court."[2] AAA, Consumer-Related Disputes Supplementary Procedures, Rule C-7(c), available at http://www.adr.org/sp.asp?id=22014#C7. But consumers are freed from complying with the

[2] AT&T Mobility's arbitration agreement provides that arbitration will be conducted under the American Arbitration Association's rules and allows for attorney's fees, punitive damages, injunctions, and any form of individual relief that a court could provide. See Pet. App. 11a n.10.

procedural and evidentiary requirements that courts impose on plaintiffs. See, *e.g.*, JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY ¶ 1.3.1, at 5–6 (Nat'l Inst. for Trial Advocacy ed., 1997) ("Arbitration, while having some of the evidential and procedural regularity of court adjudication, is conducted in a less formal and less rigorous setting, thereby enhancing the potential for more expeditious resolution.").

Consumers are not the only ones who save when arbitration substitutes for litigation. Companies save, too, and competition ensures that those savings are passed along to consumers. See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 260 (2006); see also *Carnival Cruise Lines, Inc.* v. *Shute* 499 U.S. 585, 594 (1991) (acknowledging that passengers benefit from savings "that the cruise line enjoys by limiting the fora in which it may be sued"). The savings most likely will take the form of lower prices, but they also manifest themselves as extended warranties or other improvements in quality. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 (2001).

On top of all this, evidence suggests that "consumers are likely to fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1712 (2005). One

inquiry into consumer arbitration cases between January and August 2007 reported that consumers settled or voluntarily withdrew 60% of consumer-initiated arbitrations, and prevailed in 48% of the cases that were decided by the arbitrator. See AAA, Analysis of the American Arbitration Association's Consumer Arbitration Caseload (2007), available at http://www.adr.org/si.asp?id=5027. Another found that consumers win relief in 53.3% of the cases they file before the AAA. See Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association* 68 (2009), available at http://www.searlearbitration.org/p/full_report.pdf.

Yet another investigation yielded similarly pro-consumer results in lending-related, consumer-initiated cases between 2000 and 2004. Of the arbitrations examined, 55% were resolved in the consumer's favor. See Ernst & Young LLP, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 2 (2004), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf. When satisfactory settlements and cases dismissed at the claimant's request were considered, consumers prevailed in an impressive 79% of cases.[3] See *ibid.*

[3] Individual claimants fare similarly well in other contexts. One study, which compared the results of arbitration and litigation in employment disputes, concluded that employee claimants are four times more likely to prevail in arbitration. See Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46-48 (1998). Other studies of employment disputes have less dramatic but nevertheless consistently pro-claimant findings. See, *e.g.*, National Workrights Institute, *Employment Arbitration: What Does the Data Show?*, http://www.workrights.

It should not be surprising, then, that consumers—as opposed to the plaintiffs' bar and certain courts—have largely proven satisfied with arbitration as an alternative to litigation. Consumers are pleased with the fairness and confidentiality of the process, as well as its timeliness. *See* Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 24 28 (2005), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf; Ernst & Young LLP, *supra*, *Outcomes of Arbitration* at 11.

2. Consumers do not look on litigation so favorably. As Congress observed a decade ago, many feel litigation is "inaccessible because of its complexity and expense." Y2K Act § 2(a)(3)(B)(iii), 113 Stat. 186. At that time, only one in three Americans believed taking a case to court was affordable. *See* National Center For State Courts, *How the Public Views the State Courts: A 1999 National Survey* 2, 22 (1999), available at http://ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

Litigation is not just expensive and opaque; it is slow. Between 2000 and 2008, the median delay before reaching a civil trial in a federal district court never fell below twenty months, crossing the two-year mark in 2007 and 2008. *See* Federal Court Management Statistics, http://www.uscourts.gov/fcmstat/index.html (last visited Feb. 24, 2010). The state courts are no speedier, with the average civil case in 2005 taking between twenty and twenty-six months to get through trial. *See* Lynn Langton & Thomas H.

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org/current/cd_arbitration.html (last visited Feb. 24, 2010) (finding a 62% success rate for employees in arbitration and only a 43% success rate in litigation)

Cohen, Bureau of Justice Statistics Special Report, *Civil Bench and Jury Trials in State Courts, 2005* 8 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf. Arbitration, by contrast, is rapid. In 2007, AAA arbitrations lasted four to six months, on average. See AAA, Analysis of American Arbitration Association's Consumer Arbitration Caseload (2007), available at http://www.adr.org/si.asp?id=5027.

3. The drawbacks of litigation are exacerbated, not alleviated, in class actions. Class actions drag on for years in pursuit of "relatively paltry potential [individual] recoveries," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997), which may be why Congress has found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4. Lawyer fees usually consume a substantial chunk of a class's recovery, when there is any money to be had. Coupon-based settlements, in which companies pay class action plaintiffs in vouchers redeemable for goods or services, have been particularly common in consumer class actions. See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 993–994 (2002). Restrictions on the ability to redeem the coupons can reduce the value of coupon-based settlement substantially. See *id.* at 996; see also Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1189 (2009) ("In some settlements, such as 'coupon' settlements, * * * class counsel receive

large fees while class members receive little or nothing of actual value.").[4]

The only people almost certain to profit from class actions are the attorneys who bring them (which likely explains the push for class actions where individual arbitration makes more sense for both parties). See, *e.g.*, Leslie, *supra*, 49 UCLA L. REV. at 993; Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 168 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996). To some, who believe class actions are intended only to aggregate small claims into bigger ones, this is as it should be. But when claimants have the option to obtain their *full* recovery, without having such a large portion first reserved for someone else, class actions become a far less rational alternative.

4. Class actions may have the advantage of enabling some plaintiffs to pursue claims that "would be uneconomical to litigate individually," *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985), but individual arbitration has that advantage as well. In one sample of employment disputes resolved in AAA arbitrations, for example, a third of claimants paid

[4] Although the Class Action Fairness Act contained a provision intended to limit coupon-based settlements, that provision has been criticized as both flawed and easily avoided by collusive class attorneys and defendants. See, *e.g.*, Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1873–1874 (2008); Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1698–1705 (2006).

nothing at all for the arbitration. See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 802 (2003). As more companies adopt pro-consumer arbitration provisions like those featured in AT&T Mobility's arbitration agreement (see Pet. 6–10), arbitrations that are free for consumers will become still more common.

As this Court has recently recognized, "[p]arties generally favor arbitration precisely because of the economics of dispute resolution," particularly in disputes involving small sums of money. *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1464 (2009). "[A] desire to keep the effort and expense required to resolve a dispute within manageable bounds" motivates parties to opt for the "streamlined proceedings and expeditious results" of arbitration over litigation. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

Arbitration is particularly well suited to resolving the small-scale disputes that routinely arise in commercial relationships like the one between AT&T Mobility and the Concepcions. Many Chamber members enter into long-term contracts with consumers for services provided and paid for on a periodic basis. When disputes arise in that sort of relationship, they tend to involve minor charges or adjustments to monthly bills—claims that would not be worth litigating individually, yet may not be sufficiently generic to meet the commonality requirement of Federal Rule of Civil Procedure 23. See FED. R. CIV. P. 23(a)(2). For those kinds of claims, class actions will not serve, and

arbitration is the only practical alternative—a problem the Ninth Circuit overlooked.[5]

B. When Courts Invalidate Arbitration Agreements In Violation Of The FAA, Companies And Consumers Risk Losing The Benefits Conferred By The Procedure

1. With Section 2 of the FAA, "Congress declared a national policy favoring arbitration." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984). Under that policy, businesses understand that they must conform their arbitration agreements to the generally applicable contract law of the States, but expect that doing so will guarantee the federal enforcement of those agreements.

Decisions like the Ninth Circuit's, which change the usual rules of contract law when (and because)

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[5] Under California's *Discover Bank* rule, many claims that are unsuitable for class litigation will get to court, only to be dismissed at the class certification stage. California's rule empowers plaintiffs to invalidate their arbitration agreements by merely *alleging* that the defendant has carried out a scheme to cheat customers. See Pet. App. 7a. Unless a defendant can prove it did not—a reversal of the usual burden of proof, see *Amchem Prods.*, 521 U.S. at 614, and a tall order—it will soon find itself embroiled in a putative class action in court rather than an individual arbitration. Class certification is appropriate, however, only "if the trial court is satisfied after a rigorous analysis" that common questions of law and fact predominate over questions affecting only individual members. *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982). Most claims that began as individual arbitrations will not survive the court's "close look," *Amchem Prods.*, 521 U.S. at 615, and the plaintiff consumers will soon find themselves left with only the economically senseless prospect of litigating individually.

arbitration agreements are involved (see Pet. App. 4a–7a), upset that expectation. Without confidence that their arbitration agreements will be upheld, some companies may eventually abandon them,[6] which would result in the loss of the benefits of arbitration relative to litigation described in Part I.A, *supra*. Dispute resolution costs for such businesses would increase, and the businesses would pass those costs on to consumers. Dispute resolution would cost more for consumers, too, so many might choose to forgo deserved remedies because they were worth less than it would cost to recover them.[7]

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[6] When arbitration agreements that are as consumer-friendly as AT&T Mobility's are found to be unconscionable, companies may be forgiven for concluding that they will never be able to design an arbitration agreement that satisfies courts in some economically important jurisdictions. Abandoning arbitration agreements is even more likely when the objectionable portion of the arbitration agreement is its requirement that arbitration proceed in the traditional, individual form. Individual arbitration has lower procedural costs than any form of litigation and also provides protection against the risk of being exposed to a massive class-action judgment.

[7] Class arbitrations—California's occasional compromise between class actions and individual arbitration, see, *e.g.*, *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1103 (Cal. 2005)—"may actually prove more burdensome than class litigation," Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 774 (2004). They demand the same, onerous class certification determinations that class actions require, with an additional step (court review) to boot. *See* AAA, Supplementary Rules for Class Arbitrations, Rules 3–5, available at http://www.adr.org/sp.asp?id=21936#3%20Construction%20of%20the%20Arbitration%20Clause. And class arbitrations come with problems all of

2. For companies that continue to use arbitration agreements, the inconsistent enforcement of those agreements across jurisdictions would decrease the efficiency gained by using them. In addition, those businesses would be forced to contend with forum-shopping counsel, who would bring their cases in the jurisdictions most likely to release their clients from their agreement to arbitrate individually, notwithstanding this Court's attempts to discourage forum shopping in disputes involving arbitration, see, *e.g.*, *Southland*, 465 U.S. at 15 (discounting an interpretation of the FAA because, under that interpretation, the Act would "encourage and reward forum shopping"). Class action plaintiffs' lawyers already know, for instance, that California invalidates class-action waivers in arbitration agreements, and have successfully brought class actions in California on behalf of non-California residents whose home States would have compelled arbitration. See, *e.g.*, *Masters v. DirecTV, Inc.*, Nos. 08-55825, 08-55830, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009) (unpublished).

To the extent that out-of-state claimants stay at home (instead of litigating in jurisdictions that do not compel arbitration), residents of jurisdictions like

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their own. Arbitrators are selected by named parties, so absent class members may protest that arbitrators were selected without any input from them, arguably in violation of the bedrock requirement that arbitration be entirely consensual. Others may object to having their claims arbitrated as part of a class at all, given that they signed individual arbitrations agreements, indicating their preference for settling their disputes in that manner. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 113 (2000).

California will enjoy subsidized goods and services at the expense of consumers in jurisdictions where individual arbitration agreements are respected. For several market-based and regulatory reasons, many national and regional companies will be unable to charge residents of some States a higher price to reflect the added litigation costs created by invalidation of arbitration agreements in other States. That means the extra litigation costs will be spread across the companies' entire customer base, even though only some customers enjoy the "benefit" of the abrogation of individual arbitration agreements.

II. The *Discover Bank* Rule Is Not Generally Applicable But Targeted, And Therefore Is Preempted By The FAA

This Court has considered knotty procedural issues pertaining to attempts to bring class actions in situations involving arbitration clauses. *See Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, No. 08-1198 (argued Dec. 9, 2009). But the Court has never decided whether Section 2 of the FAA preempts an attempt to use state "unconscionability" law to invalidate a clause requiring that arbitration proceed on an individual basis. The nature of the inquiry under Section 2 is such that no decision by this Court can address all of the possible ways different States' laws can interact with different waiver clauses. But a reversal in this case would reassure businesses that they can construct their arbitration agreements around the standard principles of contract law in the States in which those agreements are in effect and trust that those agreements will be "enforced according to their terms," as the FAA requires. *Volt Info.*

Scis., Inc. v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). And reversal in this case is appropriate.

Although cast as "simply a refinement of the unconscionability analysis applicable to contracts generally in California," Pet. App. 12a–13a (quoting *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)), the *Discover Bank* rule distorts the traditional analysis profoundly. In place of the usual substantive unconscionability test, the California courts have substituted a test crafted specifically to deal with class-action waiver clauses in arbitration agreements, and the Ninth Circuit has thus far followed it. *See* Pet. App. 4a–11a. The cases in this line are irreconcilable with Section 2 of the FAA and this Court's cases interpreting it, which permit the invalidation of agreements to arbitrate only "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

1. Unconscionability is, "by its very nature, vaguely defined," Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 74 (2005) (citing JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION § 29.1 (rev. ed. 2002)), but there are limits to the doctrine's reach. Ordinarily, to find a contract unconscionable, California courts require some combination of "procedural" and "substantive" unconscionability. *See Discover Bank* v. *Superior Ct.*, 113 P.3d 1100, 1108 (Cal. 2005); *see also* Susan Randall, *Judicial Attitudes Toward Arbitra-*

tion and the Resurgence of Unconscionability, 52 BUFF. L. REV. 185, 191 (2004) (observing that, according to the Uniform Commercial Code, "[c]ourts generally recognize two types of unconscionability * * * and may require the presence of both in order to find a particular agreement unconscionable").

Substantive unconscionability (the kind at issue here) "focuses on the actual terms of the agreement and evaluates whether they create 'overly harsh' or 'one-sided' results as to 'shock the conscience.'" *Aron* v. *U-Haul Co.*, 49 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2006); accord *Discover Bank*, 113 P.3d at 1108 (observing that the substantive unconscionability test focuses on "overly harsh" or "one-sided" results). In California, as elsewhere, an unconscionable bargain is one such as "no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other." *Odell* v. *Moss*, 62 P. 555, 557 (Cal. 1900) (quoting 1 Story, *Eq. Jur.* §§ 244, *et seq.*); accord *Cal. Grocers Ass'n* v. *Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Cal. Ct. App. 1994).

2. Despite these established principles, California courts and the Ninth Circuit have begun to invoke substantive unconscionability to invalidate arbitration agreements on the basis of the class action waivers contained in those agreements, even when it is clear that the waivers inflict no harm on the parties appearing before the court. To reach that result, the courts have applied California's *Discover Bank* rule, which was articulated for the first time by the California Supreme Court in a 2005 case addressing "the unconscionability of class action waivers in arbitration agreements." Pet. App. 5a.

Under the *Discover Bank* rule, the unconscionability of class-action waivers turns not on their harshness or one-sidedness, but on three different factors, including whether it is "alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money."[8] Pet. App. 7a. When such allegations have been made, California courts say, invalidation of class-action waivers is necessary to deter companies from enacting policies that inflict small injuries on many people; when each injury is too small for an individual to bother pursuing, the "unscrupulous wrongdoer" will pocket "the benefits of its wrongful conduct." See *Discover Bank*, 113 P.3d at 1106, 1108; see also Pet. App. 46a.

Regardless of the proffered rationale, it is clear that the California courts are not invalidating class-action waivers in arbitration agreements because they are "harsh" or "oppressive" to the contracting parties. As this case demonstrates, courts following the *Discover Bank* rule will invalidate the waivers even when the terms are admittedly those a reasonable person would want. See Pet. App. 4a–5a, 42a (invalidating AT&T Mobility's arbitration agreement because of its class-action waiver even though the district court found that consumers "may well prefer" arbitration to a class action). AT&T Mobility's ex-

[8] Courts applying the *Discover Bank* rule also consider whether the agreement is a contract of adhesion and whether disputes between the contracting parties are "likely to involve small amounts of damages." Pet. App. 7a. The Ninth Circuit has held that class-action waivers may be unconscionable even if they do not satisfy all three parts of the *Discover Bank* test, but has not had to decide the circumstances under which they would be. See *ibid.*

tremely consumer-friendly arbitration agreement (see Pet. 6–10) makes it impossible to believe that the Ninth Circuit has applied California's traditional unconscionability doctrine without bias against arbitration. At least with regard to class-action waivers, then, it seems "California has created a new brand of unconscionability," one that is "far more demanding" than the norm and "unique to arbitration." McGuinness & Karr, *supra*, 2005 J. DISP. RESOL. at 62; see also Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 39–40 (2006) ("Although ostensibly applying the 'generally applicable' contract defense of unconscionability, in cases involving the validity of arbitration agreements the California courts routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration.").

3. The ostensible basis for California's new unconscionability doctrine is a belief that non-arbitral resolution of certain kinds of disputes is necessary to enforce the laws of the State.[9] See *Discover Bank*,

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[9] It is also possible that the California courts are motivated by a "long-standing judicial hostility toward arbitration" of the sort that pervaded before the passage of the FAA. See Randall, *supra*, 52 BUFF. L. REV. at 186. In contrast to their practice twenty years ago, courts—especially California courts—are now nearly twice as likely to find arbitration agreements unconscionable as they are any other contract. See *ibid.*; see also Broome, *supra*, 3 HASTINGS BUS. L.J. at 39 ("While in most jurisdictions the judiciary has long abandoned its historical hostility to arbitration as an alternative to litigation, * * * in California the courts continue to view arbitration agreements critically.").

113 P.3d at 1110; see also Pet. App. 46a. The States are not so much in need of help enforcing their laws that arbitration agreements may be disregarded, however. See, *e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (noting that state law enforcement mechanisms "further tend[] to show" that class-action waivers "[do] not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability"); *cf. Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).[10] One of the laws at issue in this case, for example, empowers the state Attorney General and local prosecutors to enforce the act through civil penalties and injunctive relief. See CAL. BUS. & PROF. CODE §§ 17204, 17206. Even without the robust enforcement mechanism available to the State in this case, the individual pursuit of arbitral remedies by consumers can provide just as powerful a deterrent against illegal practices as can a class action. See *Mitsubishi Motors*, 473 U.S. at 637 ("[S]o long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum, the statute

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[10] In *Gilmer*, this Court rejected an argument that arbitration in lieu of agency proceedings would undermine the role of the Equal Employment Opportunity Commission in enforcing the Age Discrimination in Employment Act of 1967. *Gilmer*, 500 U.S. at 28–29. Similarly, in *Preston*, the Court did not mind that arbitration would, in the plaintiff's view, "undermine the Labor Commissioner's ability to stay informed of potential illegal activity." *Preston*, 552 U.S. at 358. Quoting *Gilmer*, the Court said, "The 'mere involvement of an administrative agency in the enforcement of a statute' * * * does not limit private parties' obligation to comply with their arbitration agreements." *Ibid.*

will continue to serve both its remedial and deterrent function.").

4. Under the FAA, arbitration agreements must be enforced and interpreted under the same principles of contract law applicable to contracts generally, placing arbitration agreements "upon the same footing as other contracts." *Volt*, 489 U.S. at 474. For a state contract principle to override an arbitration agreement, it is insufficient that it avoids overt discrimination against arbitration; it must apply universally to "any" and every contract. This means courts may invalidate class-action waivers in arbitration agreements as unconscionable only if they have subjected the waivers to the same unconscionability analysis they would have applied to the terms of any other contract. See *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

The unconscionability standard that the Ninth Circuit and California courts employ against class-action waivers is not a ground for the invalidation of "any" contract, as Section 2 of the FAA requires, but rather a rule applicable only to the subset of contracts that concern resolution of disputes. When parties agree to arbitrate, they agree to resolve any future differences out of court. And when California changes the rules of unconscionability governing agreements to resolve disputes out of court—here by looking beyond the parties before the court to find unconscionability—it changes the rules of unconscionability that govern arbitration agreements. *Cf. Wince* v. *Easterbrooke Cellular Corp.*, No. 2:09-CV-135, 2010 WL 392975, at *4–5 (N.D.W. Va. Feb. 2, 2010) (upholding class-action waiver in arbitration agreement against an unconscionability challenge in

part because to do otherwise would impose "heightened requirements" on agreements to arbitrate).

That is precisely what the FAA prohibits. There is nothing objectionable about saying that a provision of an arbitration agreement may be invalidated because it is unconscionable under state law. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686 (1996). The *ad hoc* manipulation of unconscionability doctrine, however, is inconsistent with this Court's admonition that state-law contract defenses may be used to void arbitration provisions only if they "arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added).

Under the FAA, "States may regulate contracts, including arbitration clauses, under general contract law principles," even invaliding them when state law would permit the revocation of "any" contract. *Allied-Bruce*, 513 U.S. at 281. "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Ibid.* For that reason, neither the *Discover Bank* rule nor the Ninth Circuit's application of that rule in this case is consistent with the FAA.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

CTIA—The Wireless Association® ("CTIA") is a non-profit organization representing a diverse array of participants in the Nation's wireless communications industry. CTIA's membership includes hundreds of service providers, manufacturers, wireless data and Internet companies, as well as other contributors to wireless services. On behalf of all sectors of the wireless communications industry, CTIA appears in regulatory proceedings before the Executive Branch, the Federal Communications Commission, Congress, and various state legislative bodies. CTIA also undertakes outreach efforts to the government and the public to raise awareness on issues of importance to the wireless communications industry. As part of those efforts, CTIA has repeatedly filed briefs as *amicus curiae* when this Court considers important arbitration issues. *See, e.g.*, *Stolt-Nielsen N.A. v. Animalfeeds Int'l Corp.* (2009); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Preston v. Ferrer*, 552 U.S. 346 (2008).

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[1] The parties have consented to the filing of this brief. Counsel for all parties have been given notice of the *amicus curiae*'s intention to file their brief as required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Many CTIA members enter nationwide service agreements with their customers. The agreements typically include requirements that customer complaints be resolved through arbitration rather than litigation, and often stipulate that arbitration must proceed on an individual rather than class-wide basis. By ensuring that disputes are resolved out of court through a streamlined, time-efficient, and cost-effective process, CTIA members are able to lower costs for wireless service to the benefit of their customers.

By conditioning enforcement of arbitration agreements on the availability of class-action procedures for complaining customers, the Ninth Circuit has effectively dictated the way in which arbitration must be conducted — by procedures that directly contradict the arbitration agreement as written. Nothing could more squarely subvert the federal policy favoring arbitration reflected in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and consistently espoused by this Court's precedents. Moreover, by allowing California law to dictate how arbitration is conducted, the Ninth Circuit's decision means that the enforceability of nationwide agreements for nationwide wireless service will vary from State to State and turn on the happenstance of where the customer resides and files suit. That anomaly undermines both the national policy of the FAA and the interests of CTIA and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below poses a direct threat to the FAA and its policy favoring arbitration. By allowing a state policy preference for class actions to trump the FAA, the Ninth Circuit has defeated the federal policy favoring arbitration. Allowing arbitration only at the expense of agreeing to class treatment is not a mere condition on arbitration; it is an attack on arbitration. For the millions of companies that regard class certification and arbitration as a problematic combination that is not amenable to the "streamlined proceedings and expeditious results" that are the hallmarks of private arbitration agreements, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985), and have therefore limited arbitration agreements to individual claims, the Ninth Circuit's imposition of class-action procedures based on California law flouts the plain terms of their arbitration agreements. The FAA surely preempts States from upending the parties' agreement in this way.

For wireless carriers, the Ninth Circuit's decision has ripple effects that extend far beyond California and the Ninth Circuit. Although the decision involved California law, its interpretation of the FAA opened the door to an onslaught of unconscionability challenges to contracts in other jurisdictions within the Ninth Circuit and across the country. Nor is the decision's impact limited to California customers; out-of-state customers will invoke California law to invalidate arbitration agreements of California-based businesses.

Moreover, the impact of effectively exempting even California alone from the FAA cannot be gainsaid. The size of the California market may give plaintiffs' lawyers across the country reduced incentives to file anywhere else. California, however, is simply too big to be excepted from the federal policy embodied in the FAA. Nor does it make sense to have the arbitrability of disagreements about nationwide service under a nationwide contract turn on the happenstance of where suit is filed.

In sum, the Ninth Circuit's decision turns the FAA's policy in favor of arbitration on its head, conditioning enforceability on a state-law policy hostile to the arbitration of individual disputes. In the meantime, its decision calls into doubt the enforceability of millions of arbitration agreements. For all those reasons, this Court's immediate intervention is needed.

ARGUMENT

I. The Decision Allows A State Policy Preference To Trump The Terms Of An Arbitration Agreement And The FAA's Federal Policy In Favor Of Arbitration.

This Court should grant review because the Ninth Circuit's decision starkly illustrates the dangers of allowing States to superimpose particular procedures and policy preferences on private arbitration agreements. That result is inimical to the parties' bargain as written and usurps the federal policy in favor of arbitration as reflected in the Federal Arbitration Act and recognized by this Court.

The FAA was a direct response to the historic "hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). To place arbitration contracts on equal footing with other contracts, section 2 of the FAA provides that arbitration agreements "*shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added); *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). The "primary purpose" of the FAA, this Court has repeatedly explained, is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989).

This Court has consistently reinforced the FAA's "federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). When "the problem at hand is the construction of the contract language itself," the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25. When there are "judicial policy concern[s]" about the implications of an arbitration agreement, those concerns cannot justify declining to enforce the agreement altogether. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009). And since *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court has made clear that the FAA's expansive policy

favoring arbitration applies "in state as well as federal courts" and bars "state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 10, 16.

CTIA members have embraced the "simplicity, informality, and expedition of arbitration" on a massive scale. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Preston v. Ferrer*, 552 U.S. 346, 357 (2008) ("prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results'") (quoting *Mitsubishi Motors*, 473 U.S. at 633). Wireless carriers have opted for arbitration, in part, to avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37, § 2(a)(3)(B)(iv), 113 Stat. 185, 186. The wireless communications industry has also recognized that arbitration allows for the efficient resolution of even small-dollar disputes, enabling carriers to reduce dispute resolution costs in a competitive environment. CTIA members have opted for arbitration over the alternative of litigation, moreover, because it entails a less adversarial process that helps carriers maintain customer satisfaction and loyalty even in addressing complaints. For wireless carriers, that ability to retain customers through cost-effective and quality customer care has become increasingly critical as competition in the mobile phone industry has flourished in response to the "[r]elatively low prices" offered. *In re Annual Report and Analysis of Competitive Market Conditions With Respect to*

Commercial Mobile Services, FCC 08-28, WT Docket No. 07-71 ¶¶ 225, 290 (Feb. 4, 2008).

At the same time that the wireless communications industry has widely incorporated arbitration provisions, they have also limited the agreements to arbitrate to *individual* claims. Literally hundreds of millions of arbitration agreements expressly require that the arbitration proceed on an individual basis.

For carriers seeking the streamlining and efficiency benefits of traditional arbitration, class arbitration "import[s] collective action into the arbitration context" and thereby incorporates complex procedures and multiple parties in ways that frustrate those basic benefits. Kathleen M. Scanlon, *Class Arbitration Waivers: The "Severability" Doctrine And Its Consequences*, 62 DISP. RESOL. J. 40, 42 (2007). Dealing with a coordinated putative class of potentially hundreds or thousands of customers entails fundamentally different — and fundamentally more complex — proceedings than those in an individual arbitration. For example, the class question injects a host of additional steps into the dispute resolution process at the threshold: (1) discovery to determine whether the numerosity, typicality, commonality, and adequacy of representation requirements are satisfied for the class; (2) plenary briefing on class certification; (3) an evidentiary hearing; (4) a written ruling; and (5) a motion to vacate, and cross-motion to confirm, the arbitrator's class determination award in the district court. Class arbitration, meanwhile, is governed by procedures that substantially replicate the private judicial

system — the very system the carriers seek to bypass for a more streamlined alternative in arbitration. *See* American Arbitration Association (AAA), *Commercial Arbitration Rules and Mediation Procedures*, http://www.adr.org/sp.asp?id=22440; AAA, *Supplementary Rules for Class Arbitrations*, http://www.adr.org/sp.asp?id=21936 (almost completely mirroring the Federal Rules of Civil Procedure). Moreover, even when the defendant prevails in or settles a class arbitration, the arbitral award may not be final because uncertainty surrounds whether the award is binding on absent class members.[2] For these reasons, a class action ban is frequently the most valuable provision in an arbitration agreement from a carrier's perspective.

The Ninth Circuit's decision simultaneously invalidates those individual-claim-only arbitration agreements and dramatically undermines the federal policy in favor of enforcing and encouraging arbitration. The Ninth Circuit held, in essence, that a State-law policy — California's minority view that class-action waivers are unconscionable

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[2] Under *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), class actions "implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party." *Id.* at 846 (internal quotation marks omitted). Absent class members might contend, for example, that their due process rights were violated because they had no say in the selection of arbitrator. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 113 (2000).

— trumps the parties' bargain and section 2 of the FAA. The court's conditioning of the enforceability of private arbitration agreements on the availability of procedures expressly foreclosed in the arbitration agreements is flatly at odds with the very concept of arbitration — private parties bargaining around the procedural constraints of litigation. Nor does it comport with the FAA's "primary purpose" of "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info.*, 489 U.S. at 479.

The Ninth Circuit's application of California's unconscionability doctrine attempts to reimpose the complex, costly, mass proceedings of class arbitration on carriers that have contracted to avoid those very procedures. The FAA, however, preempts States from mandating procedures for arbitration and frees parties "to structure their arbitration agreements as they see fit" and "specify by contract the rules under which that arbitration will be conducted." *Volt Info.*, 489 U.S. at 479 (citation omitted); *see also Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("procedure" is a "feature[] of arbitration" that "the FAA lets parties tailor . . . by contract"). The Ninth Circuit's decision thus subverts the express terms of the contract and fundamentally impedes "the accomplishment and execution of the full purposes and objective of Congress" in enacting the FAA. *United States v. Locke*, 529 U.S. 89, 109 (2000) (citations and internal quotation marks omitted).

II. The Decision Has Sweeping Ramifications That Extend Far Beyond California And Warrant This Court's Immediate Resolution.

The Ninth Circuit's decision, though premised on California's unconscionability law, has far-reaching and destabilizing consequences for the wireless communications industry well beyond California and the Ninth Circuit.

As the petition makes clear, the Ninth Circuit's decision conflicts with a number of other courts that have found that the FAA preempts any State law that prohibits enforcement of a class-action waiver. *See Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007); *Wince v. Easterbrooke Cellular Corp.*, No. 2:09-CV-135, 2010 WL 392391 (N.D. W.Va. Feb. 2, 2010); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001); *see generally* Pet. 17-25.

More fundamentally, however, the Ninth Circuit's decision perversely precludes nationwide contracts for nationwide service from being uniformly enforced across the Nation. Many States have not comparably invoked doctrines of "unconscionability" and so the FAA preemption issue wrongly decided below will not even arise. But as a practical matter, the enforceability of a nationwide arbitration agreement will now vary depending on which State's law applies. That scheme of State-by-State regulation will mean that the enforceability of nationwide arbitration agreements will vary from State to State — precisely the outcome that the FAA, as a national

policy favoring arbitration, was intended to prevent.

Indeed, the Ninth Circuit's decision does not even guarantee uniformity within the Ninth Circuit. States within the Ninth Circuit have different views on the enforceability of class-action waivers and the necessity of making class-wide procedures available. Accordingly, whether the terms of one arbitration agreement can be enforced will differ between States *within the Circuit* based on their respective unconscionability doctrines.

The Ninth Circuit's decision does mean that the other States within the Circuit now have free rein to adopt, like California, a fundamental policy against the enforceability of class-action waivers. Indeed, State law on unconscionability has widely emerged as a popular and potent tool for striking down arbitration agreements in recent years. "Where unconscionability challenges once appeared in less than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases involving arbitration." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging And The Evolution Of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1441 (2008); *see also* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 485-86 (2006) ("since 2000, many courts have been refusing to enforce arbitration agreements," with unconscionability as "the usual grounds for such refusals").

Commentators have attributed the increasing reliance of state courts on unconscionability to its flexible nature, which "provides opportunities for courts skeptical of arbitration to use the doctrine to evade the Supreme Court's pro-arbitration directives while simultaneously insulating their rulings from Supreme Court review." Bruhl, 83 N.Y.U. L. REV. at 1420; *see also id.* at 1449 (such decisions are "opaque to the reviewing court" because they require immersion in State law and the record, and it is "nearly impossible to tell if a court is applying state unconscionability doctrine evenhandedly"). In effect, the Ninth Circuit has given the state courts within its jurisdiction a green light to avail themselves of the "opportunities" of the unconscionability doctrine.

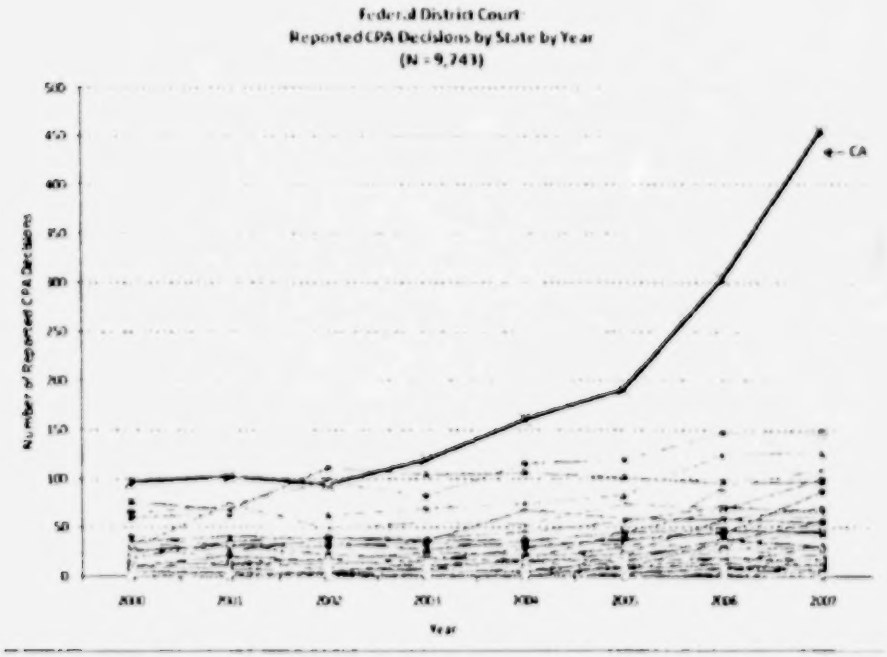
The Ninth Circuit, moreover, has made clear that its decision's impact is not restricted to residents of California. Rather, out-of-state residents may also challenge arbitration agreements as violating California law. In *Masters v. DirecTV, Inc.*, No. 08-55825, 2009 WL 4885132 (9th Cir. Nov. 19, 2009), the Ninth Circuit deemed it irrelevant that plaintiff customers hailed from Montana and Georgia. *See id.* at *1. Noting that the defendant company was based in California, that the claims were brought under California law, and that California had a "fundamental policy" against class-action waivers that was not limited to California residents, the court concluded that California law governed. *See id.* Under *Masters*, therefore, customers of California-based businesses may easily invoke California law — and thereby

circumvent the law of their home States — to test the enforceability of their contract provisions.

In any event, the sheer size of the California market means the impact of the decision below cannot be minimized. Plaintiffs' lawyers now have every incentive to forum-shop and bring suit in the Ninth Circuit to avoid adverse preemption rulings and trump the express language of their arbitration agreements. And given California's size, there is little reason to file suit elsewhere. As of June 2008, an FCC survey of mobile telephone subscribers indicated that of a reported 255.3 million subscribers nationwide, 31.9 million subscribers were in California alone. *See* FCC, *Local Telephone Competition: Status as of June 30, 2008*, at Table 14 (released July 23, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292193A1.pdf. California's subscriber population was the highest among the States by a hefty margin, with Texas and New York at a distant second and third with reported totals of 20.4 and 17.3 million subscribers, respectively. *Id.*

Indeed, the center of gravity of consumer protection litigation already lies in the California courts. Back in 2002, three California court rulings deeming class-action waivers unconscionable led to cries that the State had triggered a "Gold Rush" and "ma[de] California the class action capital of the country for small consumer claims subject to arbitration agreements." Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (But Undermine Federal Arbitration Act) By Refusing To Enforce*

"No-Class Action" Clauses In Consumer Arbitration Agreements, 58 BUS. LAW. 1289, 1289 (2003); *see also id.* at 1290 (decisions "invite plaintiffs' class action lawyers to forum shop by finding a basis for bringing suit in California with the hope of avoiding otherwise applicable no-class action arbitration clauses"). A recent comprehensive study of State Consumer Protection Act litigation from 2000 to 2007 observed that the number of reported federal decisions climbed the most substantially in California from 96 to a staggering 455. Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation Preliminary Report*, at 21 (Dec. 2009), http://www.law.northwestern.edu/searlecenter/uploads/CPA_Proof_113009_final.pdf. That significant rise in consumer class actions in California, relative to other states, is reflected in the chart below:



Id. at 21-22 chart 4. Similarly, among state appellate courts, California displayed the greatest increase in reported decisions, growing from 35 to 254. *Id.* at 21. The Ninth Circuit's decision will only amplify those trends. There is little doubt that the decision will trigger substantial volumes of expensive and burdensome litigation in California — and that a significant portion of that litigation will be generated by forum-shopping parties from out of state.

Meanwhile, AT&TM's arbitration agreement is far from the only contract ripe for challenge. The scheme of State-by-State regulation portended by the Ninth Circuit's decision will hit the entire wireless communications industry hard, because wireless carriers are typically national businesses that utilize a single nationwide contract for nationwide service. As the enforceability of agreements oscillates from State to State, wireless carriers will be forced to adopt different rules for different States. For example, Comcast has added a "Special Note Regarding Arbitration for California Customers" to its service agreement that carves out an arbitration enforcement exemption applicable only to California customers.[3] At the broadest level, then, allowing each State to determine the validity of nationwide arbitration

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[3] *See* Comcast Service Agreement, http://www.comcast.net/terms/subscriber/ ("IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE.")

agreements defeats all the efficiencies, and indeed the whole purpose, of adopting one uniform contract to govern wireless service operations across the country.

Moreover, of the more than 240 million mobile telephone subscribers in the United States, a majority have service agreements that expressly provide for *individual* arbitration. For example, the nationwide service agreements of CTIA members such as Verizon Wireless, Sprint Nextel, and T-Mobile stipulate that arbitration must proceed on an individual rather than class-wide basis.[4] By ensuring that disputes are resolved out

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[4] *See, e.g.*, Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp ("Except for small claims court cases that qualify, any dispute that results from this agreement or from the Services you receive . . . will be resolved by one or more neutral arbitrators . . . . This agreement doesn't allow class arbitrations even if the AAA or BBB procedures or rules would. The arbitrator may award money or injunctive relief only in favor of the individual party."); Sprint Nextel Service Agreement, http://nextelonline.nextel.com/en/legal/legal_terms_privacy_popup.shtml ("We each agree to finally settle all disputes [except those brought in small claims court or before a government agency] only by arbitration. . . . We each agree not to pursue arbitration on a classwide basis. We each agree that any arbitration will be solely between you and us . . . . TO THE EXTENT ALLOWED BY LAW, WE EACH WAIVE ANY RIGHT TO PURSUE DISPUTES ON A CLASSWIDE BASIS; THAT IS, TO EITHER JOIN A CLAIM WITH THE CLAIM OF ANY OTHER PERSON OR ENTITY, OR ASSERT A CLAIM IN A REPRESENTATIVE CAPACITY ON BEHALF OF ANYONE ELSE IN ANY LAWSUIT, ARBITRATION OR OTHER PROCEEDING."); T-Mobile

of court through a relatively simple, time-efficient, and less adversarial process, CTIA members have been able to lower their costs. Those lower costs in turn keep them competitive and maintain customer satisfaction.

However, if States impose class-wide arbitration procedures against the express terms of their agreements, many wireless carriers will elect for no arbitration at all. This is not speculation: Verizon's Service Agreement directly provides that "[i]f for some reason the prohibition on class arbitrations . . . cannot be enforced, then the agreement to arbitrate will not apply." Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp. Likewise, Sprint Nextel's Service Agreement notes that "[i]f for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then

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Service Agreement, http://www.t-mobile.com/Templates/Popup.aspx?WT.z_unav=ftr__TC&PAsset=Ftr_Ftr_TermsAndConditions&print=true ("WE EACH AGREE THAT . . . ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT. . . . WE EACH AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS, WHETHER IN ARBITRATION OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A MEMBER IN A CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION.")

our agreement to arbitrate doesn't apply and the dispute must be brought in court." Sprint Nextel Service Agreement, http://nextelonline.nextel.com/en/legal/legal_terms_privacy_popup.shtml. As noted above, moreover, Comcast announced in the wake of the Ninth Circuit's ruling that it will not enforce its arbitration provision against customers in California. *See* Comcast Service Agreement, http://www.comcast.net/terms/subscriber/.[5]

All of this results in more complex, inefficient, and expensive dispute resolution processes, which can only increase costs for consumers. And given the prevalence of arbitration clauses in myriad other industries — credit card agreements, brokerage accounts, insurance policies, financial services, franchisor agreements, legal, accounting and health care services, and the like[6]

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[5] The risk that companies will abandon arbitration altogether when courts superimpose class-action procedures is not merely hypothetical: In *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), for example, the First Circuit held a class-action waiver unenforceable. After deciding that plaintiffs' antitrust claims could proceed in a class arbitration, the court noted that Comcast, who had filed a motion to compel arbitration, could "seek to withdraw that motion to compel if it does not like the conditions that now apply to the arbitral forum." *Id.* at 63 n.25. To no one's surprise, Comcast immediately filed a motion to withdraw and abandoned the arbitration. *Kristian v. Comcast Corp.*, 469 F. Supp. 2d 1 (D. Mass. 2006).

[6] *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Winig v. Cingular Wireless LLC*, No. C 06 4297 MMC., 2006 WL 2766007 (N.D. Cal. Sept. 27, 2006); *Aguilar v. Lerner*, 88 P.3d 24 (Cal. 2004); *McNulty v.*

— the significant consequences for businesses in competitive industries cannot be understated.

Ultimately, when it comes to California, wireless carriers and their customers throughout the country have been deprived of the significant advantages of arbitration at the heart of their customer service agreements, and will effectively be forced into court — the very forum they sought to avoid. Those same arbitration agreements remain binding in other jurisdictions, with enforceability turning on the State law that governs a nationwide contract for nationwide service. That result makes no sense and offends the basic policy of the FAA, which Congress enacted to impose a national standard on arbitration and prevent these very inconsistencies. In light of the far-reaching practical ramifications of the decision below, this Court should not delay resolution of this critical issue any further.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

H&R Block, Inc., 843 A.2d 1267 (Pa. Super. Ct. 2004); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002); *Flores v. Transam. HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376 (Cal. Ct. App. 2002); *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997).

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

AT&T MOBILITY, LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—when national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership and to the judicial system as a whole. Based on its members' extensive practical experience, DRI is uniquely qualified to explain to the Court why the decision below creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements, which benefit customers and businesses alike, and prevents counsel from reliably advising clients as to the enforceability of such agreements. In addition, DRI desires to explain why, in its members' experience, class actions are fundamentally incompatible with arbitration and its benefits and why this specific case is an ideal vehicle for resolving the question presented.

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. The parties were notified of the intention to file this brief ten days prior to its due date, and their letters consenting to its filing are on file with the Court.

INTRODUCTION

The petition in this case presents a recurring issue of singular importance under the Federal Arbitration Act ("FAA"): whether a State may refuse to enforce an arbitration agreement solely because it does not permit class arbitration, notwithstanding the fact that the parties can fully vindicate their claims in individual arbitration. The enforceability of literally tens of millions of arbitration agreements turns on the answer to this question.

As the petition explains, the Ninth Circuit's ruling conflicts with the FAA in every way imaginable: By requiring specific arbitral procedures as a condition of enforcement of arbitration agreements, it conflicts with the FAA's primary purpose of ensuring that arbitration agreements are enforced according to their terms, including terms specifying arbitral rules and procedures. By invoking a novel brand of unconscionability devised specifically to strike down arbitration agreements, it runs afoul of the principle that the state law applied to arbitration agreements must be the same law applied to contracts generally. And by undermining arbitration's recognized advantages and creating powerful disincentives to the use of arbitration agreements, it conflicts with the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."

Because the petition fully outlines these issues, as well as the lower-court conflict, this *amicus* brief addresses additional reasons that the Court should resolve the question presented. First, the practical effect of the decision below is to impose a realistically impossible burden on a party seeking to enforce an arbitration

agreement: to *disprove* the supposed need for the "deterrent effect" of a class action. This novel burden creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements that are fair and beneficial to consumers and businesses alike.

Second, class-wide procedures are inherently incompatible with the traditional advantages and essential characteristics of arbitration—*e.g.*, informality, streamlined proceedings, expedition, low cost, and narrowly limited judicial review. It is therefore clear that California's and the Ninth Circuit's unwavering insistence on arbitral procedures to which parties will never voluntarily agree is but another attempt to "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001).

Third, the decision below makes the enforceability of arbitration agreements highly unpredictable for businesses with customers dispersed regionally and nationally. This uncertainty substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purpose of making such agreements predictably enforceable, regardless of the forum.

Finally, by refusing to enforce the remarkably pro-consumer agreement at issue in this case, the Ninth Circuit made clear that it has adopted a per se rule that consumer contracts providing for arbitration on an individual basis are unenforceable, even when, as here, the parties can fully vindicate their claims in individual arbitration. Thus, the case presents the FAA preemption issue in its most straightforward form.

ARGUMENT

I. The Decision Below Creates Insurmountable Obstacles To The Enforcement Of Arbitration Agreements.

As described in the petition, AT&T Mobility ("ATTM") has included a "Premium" and "Attorney Premium" in its arbitration agreement. Pursuant to these provisions, if a customer recovers more in arbitration than ATTM's last pre-arbitration settlement offer, the customer is entitled to a $7,500 "Premium," and the customer's attorney is entitled to recover double attorneys' fees plus costs. As the district court explained, these innovative features serve a "noble purpose" by "virtually guarantee[ing]" that, "even for claims of questionable merit," ATTM will "*accept liability*" promptly and make whole any customer who takes the few minutes necessary to complete a one-page form available on ATTM's website. Pet. App. 39a-40a. Moreover, even for claims not resolved prior to arbitration, the "Premium remains available as a substantial inducement for the consumer to pursue the claim in arbitration." *Id.*

Not surprisingly, then, the court concluded that "a reasonable consumer may well prefer quick informal resolution with likely full payment" under the ATTM arbitration provision to the remote possibility of "class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.* at 42a. As a matter of hornbook contract law, this should dispose of any contention that the provision is "unconscionable" for the straightforward reason that a contract cannot be *both* preferable to a reasonable consumer *and*

so conscience-shocking that only a delusional consumer would accept it. *See* Pet. 6.

California has, however, imposed an additional obstacle to the enforcement of arbitration agreements. Under California's rule, an agreement to arbitrate individually will not be enforced unless the party seeking to enforce it first proves that a class action is unnecessary to deter the alleged (but unproven) fraud or "wrongdoing." Pet. App. 9a-11a, 42a-47a. Applying this novel rule, the district court refused to enforce ATTM's arbitration provision because, in its view, ATTM did not produce sufficient "evidence" of arbitral deterrence to overcome "California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct." *Id.* at 44a-46a. Or, as the Ninth Circuit put it, even though "[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim"—which is "a good thing"—it is still invalid "under California law" because "not *every* aggrieved customer will file a claim." *Id.* at 11a n.9 (emphasis added).

As the petition outlines, this novel rule distorts generally applicable unconscionability principles and conflicts with the FAA in several respects. Pet. 25-34. For example, it flips the settled rule that "the party asserting unconscionability as a defense has the burden of establishing that condition." *Woodside Homes of Cal., Inc. v. Super. Ct.*, 107 Cal. App. 4th 723, 727-28 (2003); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.").

California's novel rule also creates serious—if not insurmountable—practical obstacles to the enforcement of arbitration agreements. To begin with, the requirement that the defendant *disprove* the supposed necessity of the "deterrent effect" of a class action implicitly assumes that, if the plaintiff is allowed to avoid his or her obligation to arbitrate, a class will be certified and prevail on the merits and that class members will ultimately recover. This series of assumptions, however, conflicts with the realities of class-action litigation—*e.g.*, that most putative class actions are never certified, *see, e.g.*, Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 634-35 (2006), that those that are certified often settle for "pennies on the dollar with few consumers actually submitting claims," Pet. App. 42a, and that, as a result, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," Class Action Fairness Act ("CAFA"), Pub. L. 109-2, § 2(a)(3), Feb. 18, 2005.

These implicit assumptions also saddle defendants with the untenable burden of disproving the propriety of class certification—turning on its head the ordinary rule that there is *no* "presumption" in favor of certification and that the *plaintiff's* burden of proof that Rule 23's requirements are met is *not* "a lenient one." *In Re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2009) (a motion to certify a class is subject to "rigorous analysis" and cannot be granted "in the face of doubt"). It is, however, realistically impossible for a defendant to make such a showing in a motion to compel arbitration. Because the right to compel arbitration may be waived by pursuing litigation in court, parties are admonished

"to move to compel arbitration at an early stage, before engaging in ... discovery." *Berman v. Health Net*, 80 Cal. App. 4th 1359, 1373 (2000). This makes sense because "discovery would ... subject the parties to the very complexities, inconveniences and expenses of litigation that they determined to avoid" in arbitration. *Suarez-Valdez S.A. v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649-50 (11th Cir. 1988) (Tjoflat, J., concurring). Yet the very discovery that arbitration is intended to avoid "is often *necessary*" to resolve the issue of class certification. FED. R. CIV. P. 23, Advisory Committee Notes, 2003 Amendments (emphasis added). Thus, on a motion to compel arbitration, the Ninth Circuit's presumption that class treatment is appropriate is effectively irrebuttable.

It is also contrary to the "very purpose" of the FAA to require a defendant to negate an assumption that it has engaged in "wrongdoing" that requires "deterrence" *before* its right to arbitrate the merits of the *only* basis for that assumption—the plaintiff's allegations—will be enforced. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1274 (2009) ("[The FAA's] very purpose is to have an arbitrator, rather than a court, resolve the merits."); *cf. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (courts may not rely on "public policy" as a basis for addressing the merits of an arbitral dispute). This sort of one-sided, preliminary consideration of the substantive allegations not only infringes on the arbitrator's role under the FAA but also conflicts with "Congress' clear intent ... to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

Moreover, the defendant's burden to prove that "arbitration ... is an adequate substitute for the deterrent effect of the class action mechanism"—*i.e.*, a sufficient "incentive to stop [the defendant's presumed] wrongdoing," Pet. App. 45a—is also a practical impossibility. As an initial matter, it indulges the fiction that class-action plaintiffs' attorneys who believe they have identified actionable wrongdoing will postpone filing suit to see whether arbitration proves an "adequate ... deterrent." The reality, of course, is that the first hint of a colorable claim triggers a "race to the courthouse" among lawyers hoping to land a leading role in the litigation and the lion's share of any attorneys' fees. Thus, if a defendant promptly moves to compel arbitration in response to the typical putative class action, it will be impossible for it to show that the plaintiff's allegations are already being addressed in arbitration.

In any event, given the Ninth Circuit's statement that "the problem with [the arbitration provision] under California law ... is that not *every* aggrieved customer will file a claim," Pet. App. 11a n.9 (emphasis added), even proof of a sizable number of arbitration demands based on the same allegations as the complaint does not appear to satisfy the defendant's burden. Rather, so long as there remains even *one* allegedly "aggrieved customer" who has not pursued arbitration, the agreement will not be enforced. Such reasoning confirms that the California's test is in fact impossible to satisfy and illusory.

Finally, it is similarly unclear how a defendant could ever prove to the California courts' satisfaction that arbitration is an "adequate ... deterrent" to its own "wrongdoing" (Pet. App. 45a) short of ceasing whatever practice

is alleged to be unlawful. In addition to further illustrating the impossibility of California's test, this line of reasoning conflicts with the FAA by requiring the defendant to, in effect, admit that it has acted unlawfully simply to obtain enforcement of its agreement to arbitrate. *Preston v. Ferrer*, 552 U.S. 346, 355-56 (2008).

In sum, California's novel and elusive approach to unconscionability not only imposes insurmountable obstacles to the enforcement of tens of millions of arbitration agreements but also "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995). Only a ruling by this Court can obviate the need for this costly and repetitive litigation.

II. Class Actions Are Inherently Incompatible With Arbitration.

In assessing California's insistence that consumer arbitration agreements must authorize class-wide procedures, it is essential to understand that (i) arbitration's advantages, repeatedly cited by Congress and this Court, are nonexistent in class arbitration and (ii) class-wide procedures are inherently incompatible with core features of arbitration. The decision below thus amounts to an attack on arbitration itself, an effort to "chip away at [the FAA] by indirection." *Adams*, 532 U.S. at 122.

A. The Advantages Of Arbitration Do Not Exist In Class Arbitration.

Just last Term, the Court reiterated that the fact "that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitra-

tion is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1471 (2009) (emphasis added). It is well-recognized that "[b]y agreeing to arbitrate ..., a party" "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). "Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280. For this reason, it is clear that "Congress, when enacting [the FAA], had the needs of consumers ... in mind." *Id.* However, these advantages of traditional, individual arbitration do not exist in class arbitration, which by its nature is protracted, complex, and expensive.

First, in contrast to the informality, streamlined proceedings, and expedition that are hallmarks of individual arbitration, class arbitration requires complex procedures that blur the distinction between litigation and arbitration. For example, the class arbitration rules of the American Arbitration Association ("AAA") largely copy the Federal Rules of Civil Procedure. *See* AAA, Supplementary Rules for Class Arbitrations, *at* http://www.adr.org/sp.asp?id=21936. Therefore, just as in court, class arbitration requires discovery, full briefing, an evidentiary hearing, and a written ruling on class certification. If a class is certified, absent class members must be notified and given an opportunity to opt out. The parties must then engage in protracted and expensive merits discovery typical of high-stakes class litigation. And, finally, there must be a full hearing—with an opportunity for the defendant to present individualized defenses—and a written award on the merits. Alterna-

tively, if there is a settlement, there must be another round of notice to class members, an opportunity to file objections, more briefing, a fairness hearing, and a written ruling. Indeed, class arbitration may actually prove *more* complex, lengthy, and burdensome than a judicial class action because the AAA Rules authorize a stay of proceedings to allow the parties to seek judicial review of the arbitrator's class-certification ruling. *See id.*

As these procedures suggest, the cost savings of individual arbitration do not translate to class arbitration either. In addition to the high costs of typical judicial class actions, "[c]lass arbitrations ... require the significant additional fees and costs of the arbitrators themselves.... In effect, a class arbitration is a class action proceeding in which there may be multiple judges, each charging by the hour." David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 64 (2007). In addition, given the vastly increased stakes of class arbitration and the narrow grounds for vacating an award, a defendant may feel compelled to attempt to mitigate its risk by insisting on a panel of three arbitrators despite the added expense. Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration: A Practical Perspective*, 60 DISP. RES. J. 74, 78 (July 2005) ("Having three heads is better than one, and it prevents a so-called 'rogue' arbitrator from running off in the wrong direction."). Finally, to the extent that a party values arbitrators with experience presiding over class actions (*i.e.*, retired judges), it can expect to pay premium arbitrators' fees. Thus, given that it entails substantial arbitrators' fees that have "no equivalent in a traditional, judicial class action," class arbitration may well prove more expensive

than its judicial counterpart. Clancy & Stein, *supra*, at 64. At minimum, it is clear that, unlike individual arbitration, it is *not* a "less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

The emerging data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. Indeed, although the AAA opines that the procedure is "efficient," it can only hesitantly "suggest" that, although class arbitration certainly takes longer than individual arbitration, it "*may* take less time than the average class action in court."[2] However, the AAA's own statistics belie even its tentative optimism. For example, "the median time frame from filing [a AAA class arbitration] to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days." AAA Brief at 24. While 18-21 months might be a reasonable and arguably even "efficient" period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, a whopping 85% of the cases included in the average were terminated *before any ruling on class certification*—and *none* "resulted in a final award on the merits." *Id.* at 23. Thus, like its court-administered counterpart, a class arbitration is likely to take years to complete.

The delay inherent in class arbitration is in stark contrast to the speed and efficiency of individual consumer arbitration, which, on average, results in an award on the merits in only six months—only four months if the

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[2] Brief of the AAA as *Amicus Curiae* in Support of Neither Party, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, No. 08-1198, at 24, 25 (emphasis added) [hereinafter, "AAA Brief"], *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_NeutralAmCuAAA.pdf.

case decided on documentary submissions alone,[3] a right that AT&TM's arbitration provision grants exclusively to the customer.

In short, class arbitration offers none of the advantages of traditional arbitration—*e.g.*, its speed, low cost, and streamlined proceedings—that both Congress and this Court have touted as helpful and advantageous to business and consumers alike.

B. Arbitration Lacks The Safeguards And Judicial Oversight That Are Indispensable To Class Litigation.

Class-action litigation with judicial oversight also guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms that end meritless litigation before discovery or trial and a judge with no financial incentive to certify a class. Both sides benefit from full appellate review at all critical stages of the litigation. Finally, class members benefit from judicial protection of their due-process rights, which also provides defendants with assurance that absent class members will be bound by the result. None of these protections is assured in arbitration, and some are nonexistent.

1. This Court has imposed pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345

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[3] AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, *at* http://www.adr.org/si.asp?id=5027.

(1979) ("District courts must be especially alert to identify frivolous [class actions] brought to extort nuisance settlements...."). Motions to dismiss and motions for summary judgment are thus common methods for disposing of legally and factually deficient lawsuits short of trial. In arbitration, however, dispositive motions are disfavored; indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 113 (2003). This feature of arbitration may be an extension of the common wisdom that an award may be vacated because the arbitrator refused to hear enough evidence but never because he or she heard too much. *See, e.g.*, 9 U.S.C. § 10(a)(3). In any event, in individual arbitration, this procedural limitation is widely accepted as part and parcel of arbitration's informality and streamlined proceedings. In class arbitration, however, the likely unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on meritless claims.

2. In addition, class arbitration creates the special problem that arbitrators have powerful financial incentives to certify a class. Put simply, arbitrators, who are paid by the hour, stand to earn far more if they allow a class arbitration to proceed than if they do not. *See* Clancy & Stein, *supra*, at 73-74. As this Court has recognized, a party "might ... with reason" fear a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against him." *Tumey v. Ohio*, 273 U.S. 510, 523, 533 (1927).

Reinforcing this concern, the AAA's statistics indicate that arbitrators are in fact more likely to certify a

class than either federal or state judges. Arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA Rules—a grant rate of 57.14%. *See* AAA Brief at 22. In contrast, in a Federal Judicial Center study on the impact of CAFA, federal judges granted only 18 of 62 contested motions—a rate of only 29.03%. Willging & Wheatman, *supra*, at 634-35. In the same study, state judges granted 12 of 27 contested motions—a rate of 44.44%. *Id.* Thus, AAA arbitrators appear nearly *twice* as likely to grant class certification as federal judges, and 12.7% more likely to certify a class than even state court judges—the very judges whose "[a]buses" provoked CAFA's enactment, CAFA, Pub. L. 109-2, § 2(a)(4), Feb. 18, 2005.

In light of such incentives and evidence, most if not all defendants will choose federal courts, where they "have no reason to suppose that [the district judge] *wants* to preside over an unwieldy class action." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

3. The extremely narrow scope of judicial review of arbitrators' class-certification decisions and final awards on the merits also poses intolerable risks for defendants. As this Court recently held, section 10 of the FAA lists the "exclusive" grounds for vacating an award, all of which "address egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Courts may *not* engage in "legal review generally." *Id.* In the context of individual arbitration, this limitation is necessary "to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. "If ... parties who lose in arbitration [could] freely

relitigate their cases in court, ... dispute resolution [would] be slower instead of faster[,] and reaching a final decision [would] cost more instead of less." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006).

In a class arbitration, however, the vastly increased stakes coupled with narrow judicial review amplify the cost of arbitrator error to an unacceptable level. As Justice Scalia put the problem: "You might not want to put your company's entire future in the hands of one arbitrator." Tr. Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_02_634/argument. No rational defendant will do so willingly.

Moreover, even in court, a class-action defendant faced with such significant potential liability is "under intense pressure to settle," *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298-1299, "even if the [plaintiffs'] position is weak" on the merits, *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). In arbitration, the lack of meaningful review—both at the class-certification stage and on the merits—intensifies this pressure and exacerbates the problem of "blackmail settlements." Indeed, a prominent plaintiffs' attorney speaking at an American Trial Lawyers Association convention touted the fact that "decision[s] by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable" as "a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71.

In an apparent attempt to address one aspect of this problem, the AAA authorizes the parties to pursue interlocutory judicial review of arbitrators' class-certification

decisions, describing the opportunity as "akin to ... interlocutory appellate review of district court class certification decisions." AAA Brief at 19. This comparison is inapt. As an initial matter, it is unclear that interlocutory review of such decisions is even permissible. "[A] district court does not have the power to review an interlocutory ruling by an arbitration panel"—*i.e.*, any "interim ruling that does not purport to resolve finally the issues submitted to [arbitration]." *Michaels v. Mariforum Shipping, S. A.*, 624 F.2d 411, 414 (2d Cir. 1980). An order granting class certification is a quintessential interlocutory ruling. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). But in any event, no court of which DRI is aware has reviewed such a ruling other than on the narrow grounds specified in 9 U.S.C. § 10, and more substantive review "akin to" federal appellate review appears to be foreclosed by *Hall Street*. Thus, even if allowable, the review contemplated by the AAA rules remains an inadequate safeguard.

4. Finally, it remains uncertain whether class arbitration is capable of protecting class members' due-process rights and producing legally binding results. Most courts have held that due-process protections do not apply to private arbitration because the parties "voluntarily" consent to the arbitral process. *E.g.*, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991). How this reasoning applies to class arbitration remains unclear. For example, do absent class members "voluntarily" consent to a class arbitration, even if they never receive actual notice of its pendency? If not, will an arbitration that fails to "provide minimal procedural due process protection" bind absent class members? *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Are arbitrators even

capable of providing such protections? *See generally, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006) (concluding that, without significant ongoing judicial supervision, they are not).

As this Court has recognized, whether a class-action defendant "wins or loses on the merits, [it] has a distinct and personal interest in seeing the entire plaintiff class bound by [the judgment] just as [it] is bound." *Shutts*, 472 U.S. at 805. For this reason, no rational defendant will agree voluntarily to a procedure that involves all the same risks and potential liability of a class action without the concomitant assurance that the result will bind absent class members.

III. The Decision Below Undermines The FAA By Creating Unpredictability In The Law.

As the petition explains, the lower courts are deeply divided concerning the enforceability of arbitration provisions such as AT&TM's. The current unpredictability of the law from jurisdiction to jurisdiction substantially undermines the certainty and value of the federal right to enforcement of arbitration agreements for businesses with customers dispersed regionally or nationally.[4] *Mos-*

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[4] This unpredictability is exacerbated by the Ninth Circuit's recent heads-I-win-tails-you-lose rulings that, on one hand, a non-California company cannot specify that the law of its home state governs its contracts with California residents because of California's supposedly "materially greater interest" in those contracts, *Omstead v. Dell, Inc.*, --- F.3d ----, 2010 WL 296089 (9th Cir. Feb. 5, 2010) (Texas company); *Oestreicher v. Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) (Florida company), while, on the other hand, a California company cannot specify that the laws of its nonresident cus-

es H. Cone, 460 U.S. at 25 n.32 (the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate"). It is therefore essential that the Court resolve the question presented so that arbitration agreements enforceable in the vast majority of jurisdictions in which they are used are not rendered unenforceable by the anti-arbitration hostility of a few courts.

To be sure, the FAA does permit courts to apply generally applicable state contract law to arbitration agreements and thus allows for *some* degree of variation in their interpretation and enforcement. In general, however, this causes few difficulties because "contract law is not at its core diverse, nonuniform, and confusing." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) (quotation marks omitted). Rather, the core common law pertaining to issues such as contract formation and contract defenses is largely settled and uniform, and its application to arbitration agreements is therefore consistent with the FAA's purpose of making arbitration agreements predictably enforceable.

The law of "unconscionability," in contrast, *is* diverse, nonuniform, and confusing. As Paul Bland, a prominent plaintiffs' attorney who has litigated this issue extensively, has explained, "the law of unconscionability *differs a great deal from state to state.*"[5] "Unconsciona-

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tomers' home states govern their contracts because of California's supposedly "materially greater interest" in the company's conduct, *Masters v. DirecTV, Inc.*, 2009 WL 4885132 (9th Cir. Nov. 19, 2009). The ultimate result in all these cases was to invalidate a consumer agreement requiring individual arbitration.

[5] Paul Bland, *Stripping the Meaning from Meaningful Choice*, TortDeform: The Civil Justice Defense Blog, July 2007 (emphasis

bility is one of the most amorphous terms in the law of contracts." Joseph M. Perillo, 7 CORBIN ON CONTRACTS § 29.1, at 377 (rev. ed. 2002).

Relying on this imprecision and the concomitant opportunity for evasion of the FAA, some courts have manipulated the doctrine to invalidate arbitration agreements not because of any "gross imposition on the particular [plaintiff] at issue"—the traditional, generally applicable basis for a finding of unconscionability—but based instead on "broadly based considerations of public policy."[6] Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1443-44 (2008). Such manipulation conflicts with this Court's recent reaffirmation that, under the FAA, "the enforceability of [an] arbitration agreement [cannot] turn on [state] public policy." *Buckeye*, 546 U.S. at 446 (quotation mark omitted). Moreover, as Justice Ginsburg aptly observed, "public policy has been called an unruly horse." Tr. Oral Argument, at 34, *Buckeye*, 546 U.S. 440, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1264.pdf.

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added), *at* http://www.tortdeform.com/archives/2007/07/stripping_the_meaning_from_mea.html.

[6] Indeed, Judge Bea understood California unconscionability law to include "a bizarre component to it that no matter how conscionable to the individual [an arbitration agreement is], the public policy of California is to use class actions...." Oral Argument, *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), at 7:55, *at* http://www.ca9.uscourts.gov/datastore/media/2009/09/17/08 56394.wma.

For this reason, courts' misuse of the bargain-focused unconscionability doctrine[7] to advance broad "public policy" goals has created substantial unpredictability in arbitration law. This is problematic because businesses often use the same arbitration agreement in contracts with customers nationwide. Thus, as the petition demonstrates, identical or near-identical provisions have been upheld in many jurisdictions while being invalidated in others. As a result, it has become impossible for DRI's members to reliably advise clients as to how to draft arbitration agreements that will be fair and "universally enforceable." *Allied-Bruce*, 513 U.S. at 279. In *Southland*, this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). That, however, is precisely the result of courts' misuse of the unconscionability doctrine.

IV. This Case Is An Ideal Vehicle For Resolving The Question Presented.

This case presents an ideal vehicle for resolving the question presented because the "third-generation" arbitration provision at issue represents the culmination of an evolution of consumer arbitration provisions. Early, "first-generation" provisions often limited the substantive remedies available in arbitration and/or required consumers to bear significant arbitration costs. Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring*

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[7] *See Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1390 (1996) ("Substantive unconscionability focuses on the actual terms of the agreement" "at the time the contract was made.").

the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape, 18 CORNELL J.L. & PUB. POL'Y 477, 503-04 (2009). Many courts deemed such provisions unconscionable and refused to enforce them. *Id.* at 504. In response, companies introduced "second-generation" provisions that eliminated substantive remedial restrictions and required businesses to pay all or nearly all of the cost of arbitration. *Id.* at 504-06. Still, however, a minority of courts refused to enforce these provisions, expressing concerns that they provided consumers with inadequate "incentives" to pursue individual claims. *Id.* at 508-09.

Apparently taking its cues from such decisions, ATTM revised its arbitration agreement to, among other things, make available the "Premium" and "Attorney Premium." *Id.* at 512-16; Pet. 7-10. As the district court found, the revised agreement "provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim." Pet. App. 42a. Thus, there can be no question that an individual customer "effectively may vindicate his or her" claims under the ATTM provision. *Randolph*, 531 U.S. at 90 (alteration omitted). What is at issue, then, is *not* a fact-bound unconscionability determination but rather a per se rule that consumer contracts calling for traditional arbitration on an individual basis are invalid.[8] The preemption issue cannot be presented any more straightforwardly.

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[8] As Judge Reinhardt commented, while "[t]he California courts [have] said that [such agreements are] not always invalid, ... I don't think they've ever found one that was okay." Oral Argument, *supra* note 6, at 17:33.

The development of consumer arbitration agreements has reached its practical endpoint. DRI is aware of no arbitration provision that is more pro-consumer than AT&TM's, and there is little, if anything, left for businesses to do in the way of creating additional "incentives" to arbitrate. The preemption issue brought to a head by California's persistent refusal to enforce even the most pro-consumer arbitration agreements is therefore ripe for decision. And this case in particular provides the Court with a unique opportunity to resolve the issue (a) without the potential complications that could accompany less consumer-friendly provisions and (b) in a way that provides clear guidance to contracting parties, lower courts, and the bar.

In addition, a ruling that the provision at issue is enforceable as a matter of "federal substantive law," "notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone*, 460 U.S. at 24, would encourage even more companies to adopt similar, pro-consumer arbitration provisions. But regardless of the result on the merits, all litigants and contracting parties would benefit from clarity on an issue that has become "unnecessarily complicat[ed]," "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMAZON.COM, INC., AND EARTHLINK, INC., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF)[1] was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act (FAA) and contractual arbitration in general, including *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, Docket No. 08-1198; *Athens Disposal Co., Inc. v. Franco*, --- S. Ct. ---, No. 09-272, 2010 WL 58763 (Jan. 11, 2010); *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008); and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Amazon.com, Inc., based in Seattle, Washington, is one of the largest and best known online retailers, opening its virtual doors on the World Wide Web in July, 1995. Amazon seeks to be the Earth's most customer-centric company, where customers can find and discover anything they might want to buy online at the lowest possible prices. During its history, Amazon.com, Inc., has relied on arbitration clauses in a variety of online contracts that govern its relationships with millions of consumers as well as with hundreds of thousands of vendors and other companies with which it does business. Amazon.com, Inc., supports the arguments favoring individual arbitration.

EarthLink, Inc. (EarthLink), is a national Internet service provider headquartered in Atlanta, Georgia. EarthLink offers access to the Internet for millions of subscribers through narrowband and broadband access services, including dial-up, DSL and cable Internet service, as well as other Internet-based services like home networking, Web hosting, and online security products. EarthLink's subscribers agree to arbitrate, on an individual basis, any disputes they have with the company in connection with their subscription to EarthLink's services. Thus, EarthLink has an interest in ensuring that the courts continue to properly and fairly enforce and construe arbitration clauses in consumer contracts.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case was brought under diversity jurisdiction in the federal courts, but the Ninth Circuit below applied California law and it is, in fact, the California

courts' open hostility to arbitration that is the crux of the problem exemplified by this case.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), this Court reaffirmed that Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, to overcome judicial resistance to arbitration and that the savings clause of Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts. Applying this federal substantive law to the states, this Court held that arbitration contracts are to be construed as any other contract, not subjected to more stringent review or disfavor because the subject matter is arbitration. The Court thus confirmed the holding of *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

These matters have been settled law for 25 years. California courts, however, still scrutinize arbitration with suspicion and dislike, and invalidate arbitration contracts with distressing regularity. Most commonly, California courts invoke unconscionability principles to invalidate the contracts. However, the unconscionability doctrine is not applied neutrally among all types of contracts, resulting in the disproportionate invalidation of arbitration provisions as opposed to other contracts. This feature of California jurisprudence, applied by federal courts exercising diversity jurisdiction, as in this case, as well as other federal and state courts, interferes with the normal and proper functioning of the California marketplace, injuring businesses and consumers alike. Because consumer contracts—including arbitration clauses—are ubiquitous throughout California and the Ninth Circuit, and because California courts are invalidating arbitration

clauses at a rate far exceeding that of any other state, this case presents an important question that can be resolved only by this Court. The petition for writ of certiorari should be granted.

ARGUMENT

I

CALIFORNIA'S UNCONSCIONABILITY DOCTRINE UNIQUELY DISFAVORS ARBITRATION CONTRACTS

This Court has recognized that the freedom to make and enforce contracts is a fundamental element of free choice and should be protected for that reason. *See, e.g., Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). This Court declared that state law grounds for invalidation must not "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue . . . . A court may not . . . rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (holding that the FAA preempts California Labor Code section 229 insofar as the statute allowed litigation in court to collect wages without regard to the existence of any private arbitration agreement). Or, as the Court rephrased the point in

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996), "Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." Yet this is *exactly* the tactic adopted by the Ninth Circuit below, applying California law.

The court below began its analysis by finding that the arbitration agreement was a contract of adhesion (defined simply as a "standardized contract" with non-negotiable terms). *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854-55 (9th Cir. 2009). This Court, however, has refused to invalidate arbitration agreements solely on the grounds that an individual must take-it-or-leave-it. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993) (arbitration agreements are enforceable even if they involve unequal bargaining power). *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (upholding a forum-selection clause in cruise-line ticket). Even California has no such requirement outside the context of arbitration. *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 449 (1986) ("The determination that a contract is adhesive is only 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.'") (citation omitted). As the Seventh Circuit noted in *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992-93 (7th Cir. 2008), form contracts are "common and enforceable" and serve an economically efficient purpose: "As long as the price is

negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention." *Id.* at 993.

Thus, to be unenforceably adhesive, a contract must also include some element of duress or lack of free choice. *See Marty*, 185 Cal. App. 3d at 449 ("[T]he weaker party may have no realistic opportunity *to look elsewhere* for a more favorable contract." (emphasis added)); *accord*, *Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699, 712 (1976) ("[T]he principles of adhesion contracts . . . do not bar enforcement of terms of a negotiated contract which neither limit the liability of the stronger party nor bear oppressively upon the weaker."); *Spinello v. Amblin Entm't*, 29 Cal. App. 4th 1390, 1396-97 (1994); *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 766-67 (1989). In *Spinello*, the court of appeal found that a form arbitration agreement was not adhesive because the plaintiff "had the opportunity to go elsewhere . . . [by] submitt[ing] his script to . . . other producers." 29 Cal. App. 4th at 1397. And in *Dean Witter*, the court recognized that the "availability of alternative products in the market . . . demonstrates that any claim based on unconscionability lacks merit." *Spinello*, 211 Cal. App. 3d at 767.

Adhesiveness has never been held sufficient to render a contract unenforceable under California law; there must be some element of substantive unconscionability as well. *See Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819-20 (1981). However, unconscionability is a notoriously flexible concept. *See* Joseph M. Perillo, *Corbin on Contracts: Avoidance & Reformation* § 29.1 (rev. ed. 2002) ("Unconscionability is one of the most amorphous terms in the law of contracts."). The

flexibility no doubt stems from the original purpose of the unconscionability doctrine: to protect consumers. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & Econ. 293, 302 (1975) ("Ideally, the unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them."). However, the doctrine was not written to enable courts to do justice by rewriting contracts. In fact, in the official comments to Uniform Commercial Code § 2-302 (2003), the drafters explained that the unconscionability principle "is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *See id.*, official comment 1; *accord* Cal. Civ. Code § 1670.5, Legis. Comm. Cmt. (same).

While the FAA permits state courts to apply "ordinary principles of unconscionability," the FAA forbids state courts from implementing substantive state policies that undermine arbitration clauses. Moreover, "a state cannot evade FAA preemption simply by labeling procedures which are inconsistent with its substantive policies as unconscionable." Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No Class Action" Clauses in Consumer Arbitration Agreements*, 58 Bus. Law. 1289, 1295 (2003). Similarly, this Court's arbitration jurisprudence does not permit a state to use unconscionability as a ground for voiding arbitration agreements in certain classes of disputes just because the state court believes those disputes are better handled by some other means of dispute resolution. *See Preston v. Ferrer*, 552 U.S. at 359 ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws

lodging primary jurisdiction in another forum, whether judicial or administrative."). As one commentator noted:

> [T]he United States Supreme Court surely would review state courts' unconscionability rulings to the extent necessary to prevent the unconscionability doctrine from effectively nullifying the FAA with respect to a huge class of contracts. Indeed, the Court has twice stated that state courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."

Stephen J. Ware, *Alternative Dispute Resolution* § 2.25(b), at 58 (West 2001) (citing *Doctor's Assocs.*, 517 U.S. at 687-88 n.3); *Perry*, 482 U.S. at 492 n.9. That is, a court may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

Nonetheless, California courts have found the unconscionability doctrine to be a valuable tool to invalidate arbitration contracts. In so doing, California has developed a deserved reputation as "hostile" to arbitration. A recent empirical analysis conducted by Stephen Broome revealed that unconscionability challenges in California succeed against arbitration provisions with far greater frequency than any other type of contract provision. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing*

the Federal Arbitration Act, 3 Hastings Bus. L.J. 39 (2006). Broome identified 114 cases in which the California Courts of Appeal considered the unconscionability of arbitration contracts; in fifty-three of those cases, the arbitration provision was held unconscionable and unenforceable and another thirteen found some aspect of the arbitration provision to be unconscionable and severed it. *Id.* at 44-45.[2]

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[2] Broome's survey included cases decided from 1982 to 2006. The starting date was set by California's adoption of the currently existing unconscionability doctrine in *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982). Broome, 3 Hastings Bus. L.J. at 44 n.33. Since 2006, court invalidation of arbitration clauses on grounds of unconscionability has, if anything, accelerated. *See Lhotka v. Geographic Expeditions, Inc.*, — Cal. Rptr. 3d —, No. A123725, 2010 WL 325491, at *5 (Cal. Ct. App. Jan. 29, 2010); *Borison v. Gibbs, Giden, Locher, Turner & Senet*, No. B216428, 2010 WL 398448, at *5 (Cal. Ct. App. Feb. 5, 2010); *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1585 (2009); *Geller v. Wedbush Morgan Securities, Inc.*, No. B211579, 2009 WL 4894961, at *5 (Cal. Ct. App. Dec. 21, 2009); *Vu v. Superior Court*, No. B123988, 2009 WL 3823383, at *5 (Cal. Ct. App. Nov. 17, 2009); *Aguilar v. E.S. Hotels (L.A.) Inc.*, No. B210159, 2009 WL 2712298, at *4 (Cal. Ct. App. Aug. 28, 2009); *Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447, 457 (2009); *Duran v. Discover Bank*, No. B203338, 2009 WL 1709569, at *7 (Cal. Ct. App. June 19, 2009); *Sanchez v. W. Pizza Enters., Inc.*, 172 Cal. App. 4th 154, 181 (2009); *Murphy v. Check 'N Go of Cal., Inc.*, 156 Cal. App. 4th 138, 149 (2007); *Fuentes v. Rent A Center, Inc.*, No. A121673, 2009 WL 2351605, at *11 (Cal. Ct. App. July 31, 2009); *Stiglich v. Jani-King of Cal., Inc.*, No. D051811, 2008 WL 4712862, at *11 (Cal. Ct. App. Oct. 28, 2008), *rev. denied*; *Kim v. Francesca's Collections of Cal., Inc.*, No. B207572, 2009 WL 1016599, at *5 (Cal. Ct. App. Apr. 16, 2009); *Tourangeau v. LBL Ins. Servs., Inc.*, No. G038637, 2008 WL 1952377, at *4 (Cal. Ct. App. May 6, 2008). *Cf. D.C. v. Harvard-Westlake Sch.*, 176 Cal. App. 4th 836, 869 (2009) (no procedural unconscionability where parents had opportunity to

(continued...)

Forty-eight cases upheld the arbitration contract. By way of contrast, of the forty-six unconscionability claims made outside the context of arbitration, forty-one of the contracts were upheld by the courts, while only five were struck down as unconscionable. *Id.* at 47. By targeting arbitration provisions for exceptionally harsh review under the unconscionability doctrine, California courts violate Section 2 of the FAA, which demands that arbitration contracts be considered on "equal footing" with any other contract. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). *See also Gilmer*, 500 U.S. at 36.

II

CALIFORNIA COURTS APPLY SPECIAL TESTS TO ARBITRATION CONTRACTS, BUT NOT OTHER TYPES OF CONTRACTS

California courts and the Ninth Circuit below restate the definition that unconscionability means "shocks the conscience," traditionally meaning something no man would contemplate unless he were delusional. *California Grocers Ass'n v. Bank of America*, 22 Cal. App. 4th 205, 214 (1994) (a substantively unconscionable contract is one that "[n]o man in his

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[2] (continued)

convince private school administrators to remove offending provision from enrollment contract containing an arbitration clause). The single exception to this trend is *Dotson v. Amgen, Inc.*, --- Cal. Rptr. 3d ---, No. 212965, 2010 WL 189653, at *7-*8 (Cal. Ct. App. Jan. 21, 2010), but as of this writing, the decision is not yet final and may be depublished or accepted for review by the California Supreme Court.

senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other" (citations omitted)); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1075 (9th Cir. 2007). But these formulations are drained of all meaning if they can be applied to the extremely consumer-friendly arbitration contract in this case, containing provisions that "essentially guarantee that the company will make any aggrieved customer whole who files a claim." *AT&T Mobility*, 584 F.3d at 856 n.9.

A. California Uniquely Employs a "Mutuality Test" to Arbitration Contract Challenges

What accounts for the California courts' willingness to invalidate arbitration contracts as unconscionable as opposed to contracts in other contexts? Mostly, the culprit is a special test that California courts apply to unconscionability claims brought only against arbitration contracts. This test—the "mutuality test"—first appeared in *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997), in which the court held that a contract that requires one party to arbitrate but not the other is so "one-sided" as to be unconscionable. *Id.* at 1532. The *Stirlin* court repeatedly labeled the contract between the parties as a "contract of adhesion," implicitly contradicting earlier California law by assuming that the label would be dispositive of the legal issues. *Id.* at 1533; *see also Kinney v. United Healthcare Servs.*, 70 Cal. App. 4th 1322, 1332 (1999) (invalidating "unilateral obligation to arbitrate"). Yet this disdain of adhesion contracts itself betrays a certain bias.

> "The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced . . . ." That is because

> there are important advantages to its use despite its potential for abuse. These advantages include the fact that standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.

Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) (quoting *Roberson v. The Money Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1526 nn.9-10 (M.D. Ala. 1997)).[3]

While expressing a purported concern for public policy, however, none of those advantages were even acknowledged by the California Supreme Court, and

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[3] Richard Epstein explains why the "mutuality argument" cannot be a legitimate basis for declaring a contract unconscionable:

> A could not complain if B decided not to make him any offer at all; why then is he entitled to complain if B decides to make him *better off* by now giving him a choice when before he had none? If A does not like B's offer, he can reject it; but to allow him to first accept the agreement and only thereafter to force B to work at a price which B finds unacceptable is to allow him to resort (with the aid of the state) to the very form of duress that on any theory is prohibited. There is no question of "dictation" of terms where B refuses to accept the terms desired by A. There is every question of dictation where A can repudiate his agreement with B and hold B to one to which B did not consent, and that element of dictation remains even if A is but a poor individual and B is a large and powerful corporation. To allow that to take place is to indeed countenance an "inequality of bargaining power" between A and B, with A having the legal advantage as he is given formal legal rights explicitly denied B.

Epstein, 18 J.L. & Econ. at 297.

that court adopted the mutuality test in *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 117 (2000), announcing that arbitration agreements must contain a "modicum of bilaterality." Since *Armendariz*, more than two thirds of the courts that invalidated arbitration provisions did so because the provisions lacked mutuality. Broome, 3 Hastings Bus. L.J. at 50-51; *see also* Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 Hastings L.J. 987, 1002 (2004) ("[I]n *Armendariz*, the court honed California unconscionability law into a weapon that could be used against mandatory arbitration agreements."). Indeed, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161 (2005), the California Supreme Court employed a form of the mutuality test to strike down class arbitration waivers. In the court's view:

> [C]lass action or arbitration waivers are indisputably one-sided. "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits."

Id. (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002), *cert. denied*, 537 U.S. 1226 (2003)). The court in *Gentry v. Superior Court*, 42 Cal. 4th 443, 470-72 (2007), *cert. denied*, 128 S. Ct. 1743 (2008), also relied on what it perceived as the one-sided nature of the contract in striking down Circuit City's class-arbitration waiver. Although some language in *Armendariz* suggests that lack of mutuality can be

justified by "business realities," *Armendariz*, 24 Cal. 4th at 117, no lower California court has yet identified a business reality sufficient to justify lack of mutuality in an arbitration agreement. Broome, 3 Hastings Bus. L.J. at 54 (citing Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 81 (2005)).[4] *See also* Thomas H. Riske, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts' Disdain for Arbitration Agreements*, 2008 J. Disp. Resol. 591, 602-04 (2008) (The supposed "business realities" exception to the mutuality test, which uses terminology associated with general contract law, but which has been factually impossible to successfully invoke, provides another illustration of how California courts hold arbitration agreements to a unique standard.). The mutuality test thus makes it significantly easier to challenge arbitration agreements as unconscionable.

Yet this Court held that "[t]he 'goals and policies' of the FAA . . . are antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs., Inc.*, 517 U.S. at 688. Given this straightforward holding, jurisdictions other than California have been unwilling to adopt a requirement

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[4] Some federal district courts, applying California law, will occasionally find that the mutuality requirement was met and uphold an arbitration agreement. *See Rutter v. Darden Restaurants, Inc.*, No. CV-08-6106, 2008 WL 4949043, at *9 (C.D. Cal. Nov. 18, 2008); *Rodriguez v. Sim*, No. C-08-3982, 2009 WL 975457, at *9-*10 (N.D. Cal. Apr. 10, 2009); *Ramirez-Baker v. Beazer Homes, Inc.*, No. CV-F-008-601, 2008 WL 2523368, at *6-*7 (E.D. Cal. June 20, 2008).

of mutuality for arbitration agreements. *See, e.g.*, *McNaughton v. United Health Care Servs., Inc.*, 728 So. 2d 592, 598-99 (Ala.), *cert. denied*, 528 U.S. 818 (1999) (A mutuality approach relies on the "uniqueness of the concept of arbitration," "assigns a suspect status to arbitration agreements," and therefore "flies in the face of *Doctor's Associates*."). *See also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) ("substantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate"); *In re Pate*, 198 B.R. 841, 844 (S.D. Ga. 1996) (same result under Georgia law); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001) ("[T]he doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.").[1]

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[1] *See also State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) ("There is no reason to create a different mutuality rule in arbitration cases. Both parties to this contract exchanged consideration in this sale of a home. The contract will not be invalidated for lack of mutuality of obligation of the arbitration clause."); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) ("[T]he agreement is not unconscionable because, even though the arbitration clause lacks mutuality of obligation, the underlying contract for the sale of Dell computers is supported by adequate consideration."); *McKenzie Check Advance of Mississippi, LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004); *Walther v. Sovereign Bank*, 386 Md. 412, 433 (2005); *In re Lyon Financial Services, Inc.*, 257 S.W.3d 228, 233 (Tex. 2008). Other than California, only Arkansas routinely invokes mutuality as a reason to invalidate arbitration contracts. *See, e.g.*, *Advance America Servicing of Arkansas, Inc. v. McGinnis*, 375 Ark. 24, 35 (2008).

Meanwhile, outside the arbitration context, California courts do not demand mutuality either. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1488-89 (1998) (unilateral mortgage agreement upheld because "[w]here sufficient consideration is present, mutuality is not essential"); *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 752 (1984) (upholding unilateral employment contract where consideration requirement is properly met; a "mutuality of obligation" is unnecessary). Thus, California's "mutuality" approach to determining substantive unconscionability in arbitration provisions differs from the standard used to analyze ordinary contractual provisions for unconscionability. Under the mutuality test, the court relies on its own speculation that the arbitral proceeding itself might impede a party's ability to obtain the requested relief.

For nonarbitration contractual provisions, California courts invalidate contracts as unconscionable only upon evidence of measurable, inevitable hardship if the disputed term is enforced. *See Phoenix Leasing Inc. v. Johnson*, No. A089871, 2001 WL 1324778, at *6 (Cal. Ct. App. Oct. 29, 2001) (invalidating provision that would have given lender $208,000 of unaccrued interest); *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 411 (1995) (invaliding landlord's attempt to appropriate a portion of the sale price of a lease); *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 83 (1991) (invalidating interest rate of 200% per annum on a secured $99,000 loan); *Ellis v. McKinnon Broadcasting Co.*, 18 Cal. App. 4th 1796, 1806 (1993) (invalidating contract that gave employer all of employee's sales commissions (which were the employee's sole compensation) that were received after the employee left the company when the

sales were generated by the employee prior to his voluntary departure); *Johnisee v. Kimberlite Corp.*, No. A107341, 2005 WL 1249198, at *8 (Cal. Ct. App. May 24, 2005) (same).[6]

B. California Courts Pay Lip Service to the Sliding Scale Test of Unconscionability, but Routinely Ignore It in Application

Under California law, a finding of unconscionability requires both procedural and substantive unconscionability, as measured on a sliding scale (the more substantively unconscionable the contract term, the less procedurally unconscionable it need be to be unenforceable and vice versa). The decision below recites this rule, and claims that *Discover Bank* merely refined, but did not alter it. *AT&T Mobility*, 584 F.3d at 853, 857 (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007)). Yet as a practical matter, California courts do not distinguish between greater or lesser levels of unconscionability—even the slightest hint of judicially perceived unfairness will suffice to meet either prong of the test. Contrary to the mandate to treat arbitration contracts the same as any other contracts, this approach does not prevail in unconscionability cases outside the context of arbitration.

An extreme example of the failure to apply the sliding scale was the California Supreme Court's

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[6] These five cases are the only ones identified by Stephen Broome where California appellate courts invalidated contracts as unconscionable outside the arbitration context. See Broome, 3 Hastings Bus. L.J. at 56-58. *See also Dalis v. Bernhard*, No. H031637, 2009 WL 932650, at *17-*18 (Cal. Ct. App. Apr. 18, 2009) (upholding nonrecourse provision of a promissory note).

decision in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *cert. denied sub nom. Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008). There, the California Supreme Court declared an arbitration agreement unconscionable because it waived an employee's right to bring a class action lawsuit. It did so despite the fact that the employees were given an information packet on the effect of the arbitration agreement, were required to watch a video providing information on the arbitration process, were told to consult an attorney before signing if they were unclear on its legal effect, and were not only *given the choice not to sign*, but were given a grace period in which to *change their minds after signing*. *See id.* at 474 (Baxter, J., dissenting). In addition, the court ignored the fact that California workers who disapprove of arbitration requirements have many other options for seeking employment. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 361 (2007).

The *Gentry* court admitted that the employer did not compel workers to sign, but concluded that the agreement was "not entirely free from procedural unconscionability" because employees "felt at least some pressure" to sign it. *Gentry*, 42 Cal. 4th at 472. Such minimal—one might argue, illusory—procedural unconscionability should have required an extremely high level of substantive unconscionability to result in an overall finding of unconscionability under the sliding scale test. But the court instead simply latched onto the class action waiver, which one would be hard pressed to describe as "extremely" unconscionable given

the number of jurisdictions that find it perfectly legitimate.

As the dissenting justice observed, the court's justifications for resisting the use of arbitration in lieu of class action litigation may have made good policy arguments, but the Legislature had chosen to enact a procedure allowing for arbitration, and declaring that public policy *favored* arbitration. The *Gentry* court simply "elevat[ed] a mere judicial affinity for class actions as a beneficial device for implementing the wage laws above the policy expressed by both Congress and our own Legislature." *Id.* at 477 (Baxter, J., dissenting). The court below similarly elevated California's preference for class action lawsuits to serve as a veto for any arbitration provision, no matter how pro-consumer in every other respect, if that provision required individual adjudication.

III

THIS CASE IS OF NATIONAL IMPORTANCE

The courts' greater receptivity to unconscionability arguments has led to the expected result: Where unconscionability challenges once appeared in less than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases involving arbitration. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1441 (2008). The issue presented by this case does not just affect California and the Ninth Circuit, although a rule that impacts the populations of just those two jurisdictions would justify review. The presumption of invalidity applied to arbitration

contracts extends far beyond the boundaries of both California and the Ninth Circuit, however, because federal courts also will invalidate any arbitration contract choice-of-law provision that does not specify California law as controlling. *Omstead v. Dell*, --- F.3d ---, No. 08-16479, 2010 WL 396089 (9th Cir. Feb. 5, 2010), adopting the reasoning of *Oestreicher v. Alienware Corp.*, 322 F. Appx. 489 (9th Cir. Apr. 2, 2009), *aff'g* 502 F. Supp. 2d 1061, 1065-69 (N.D. Cal. 2007). This is another maneuver targeted specifically to arbitration contracts.

The general rule is that where a choice of law provision exists in a private contract, California courts will honor the provision. *See Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464-65 (1992) ("In determining the enforceability of arm's-length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement section 187, which reflect a strong policy favoring enforcement of such provisions."). The contract challenged in *Omstead* had a choice-of-law provision that all disputes would be resolved under Texas law, but the Ninth Circuit held that "class action waiver is unconscionable under California law because it satisfies the *Discover Bank* test, and California has a materially greater interest than Texas in applying its own law." *Omstead*, 2010 WL 396089, at *4. *See also Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1083 (9th Cir. 2008) ("if Citibank's class arbitration waiver is unconscionable under California law, enforcement of the waiver under South Dakota law would be contrary to a fundamental policy of California" and remanding to district court for findings as to procedural unconscionability given the ability of cardholders to

opt-out of the arbitration provision); *Tamayo v. Brainstorm USA*, 154 Fed. Appx. 564, 566 (9th Cir. 2005) ("To the extent that Ohio law would enforce the class-action waiver at issue, . . . it would be contrary to California public policy and thus not applicable."); *Davis v. Chase Bank USA, N.A.*, 299 Fed. Appx. 662, 664 (9th Cir. 2008) (disregarding Delaware choice of law provision because it would permit a class action waiver in an arbitration agreement, contrary to California law).

Moreover, because class action waivers are upheld in most other courts, consumers (and their counsel) who wish to sue national corporations can circumvent those waivers by the simple mechanism of initiating a class action lawsuit in California. They need only to find a plaintiff in California to take the lead and file suit in state court, and then, once the lawsuit is under way, broaden the class action to include plaintiffs from around the country. *See* Aaron C. Gundzik & Rebecca Gilbert Gundzik, *Will California Become the Forum of Choice for Attacking Class Action Waivers?*, 25 Franchise L.J. 56, 59 (2005). Thus, although California consumers and businesses are most obviously affected by the California courts' refusal to enforce class action waivers in arbitration, the true impact is national in scope and warrants this Court's review.

CONCLUSION

The California courts consistently hold arbitration agreements to a different standard when it comes to unconscionability, and the decision below represents the latest, and most extreme, example. Seven years ago, then-Justice Janice Rogers Brown explained that "this

court appears to be 'chip[ping] away at' United States Supreme Court precedents broadly construing the scope of the FAA 'by indirection,' despite the high court's admonition against doing so" and "urge[d]" this Court "to clarify once and for all whether our approach to arbitration law comports with its precedents." *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1095 (2003) (Brown, J., concurring and dissenting) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001)).

California courts, and federal courts applying California law, are employing a special unconscionability analysis to arbitration contracts to thwart the use of arbitration. This Court should review this case to enforce its pronouncements in *Perry* and *Doctor's Associates* that unconscionability analysis may not single out arbitration contracts and treat them differently than other kinds of contracts. This Court remains the only recourse to reestablish the validity of arbitration agreements in the nation's most populous state and Circuit.

The petition for writ of certiorari should be granted.

DATED: February, 2010.

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PETITIONER'S BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RULE 29.6 STATEMENT

Petitioner AT&T Mobility LLC, a limited liability company, has no parent company. Its members are all privately held companies that are either wholly owned subsidiaries of AT&T Inc., which is publicly traded, or are also limited liability companies whose members are wholly owned subsidiaries of AT&T Inc. No other publicly held corporation has a 10% or more ownership interest in AT&T Mobility LLC.

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JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth at App., *infra*, 1a-2a.

STATEMENT

The arbitration agreement in the wireless service contract between respondents Vincent and Liza Concepcion and AT&T Mobility LLC ("ATTM") contains, in the words of one federal district judge, "perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski* v. *AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009). Among other things, the arbitration agreement specifies that the Concepcions may arbitrate for free and are entitled to a minimum recovery of $7,500, plus double attorneys' fees, if the arbitrator awards them more than ATTM's last settlement offer.

The district court in this case found that the arbitration provision "sufficiently incentivizes consumers" to pursue "small dollar" claims and "prompts ATTM" to make generous settlement offers "even for claims of questionable merit." Pet. App. 39a-40a. The Ninth Circuit agreed that the incentives created

by this provision "essentially guaranteed" that AT&TM would make whole any customer who submits a claim. *Id.* at 11a n.9. Nonetheless, both courts felt "compel[led]" (*id.* at 46a) to hold that AT&TM's arbitration provision is unconscionable under California law—not because it is unfair to the named plaintiffs or would prevent them from vindicating their own claims—but because it would prevent them from representing a putative class of AT&TM subscribers with allegedly similar state-law claims.

If allowed to stand, the Ninth Circuit's decision applying California law will be the death knell for consumer arbitration in California, and possibly in many other States within that Circuit. For if an arbitration agreement that contains "perhaps the most fair and consumer-friendly provisions" that one judge has ever seen is unenforceable under California law, then no agreement providing for bilateral arbitration will be enforceable under California law. As we explain, however, the Ninth Circuit's decision cannot stand. The California rule applied by the Ninth Circuit is preempted by the Federal Arbitration Act ("FAA").

1. **The Federal Arbitration Act.** Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted). In preserving the benefits of arbitration, "Congress * * * had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Indeed, because it "allow[s] parties to avoid the costs

of litigation," arbitration benefits individuals with "smaller" claims, such as employees (*Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001)), or "the typical consumer" who otherwise would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery" (*Allied-Bruce*, 513 U.S. at 281).

Section 2 of the FAA commands that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2; emphasis added by the Court). "That is, as a matter of federal law, arbitration agreements and clauses are to be enforced *unless* they are invalid under principles of state law that govern all contracts." *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir. 2004) (emphasis in original).

2. California's Unconscionability Law And Its Unique Test For Contracts Requiring That Disputes Be Resolved On An Individual Basis. Under California law, courts "may refuse to enforce" any contract found "to have been unconscionable at the time it was made," or sever or "limit the application of any unconscionable clause" in order "to avoid any unconscionable result." CAL. CIV. CODE § 1670.5(a). The proponent of unconscionability must prove both "procedural" and "substantive" unconscionability. *Armendariz* v. *Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000). Procedural unconscionability focuses on the fairness of the contracting process, while substantive unconscionability focuses on whether the contract "shock[s] the

conscience" (*Belton* v. *Comcast Cable Holdings, LLC*, 151 Cal.App.4th 1224, 1245 (2007)) or is one that a person would have to be "under delusion" to accept (*Herbert* v. *Lankershim*, 9 Cal.2d 409, 484 (1937); *Odell* v. *Moss*, 130 Cal. 352, 358 (1900); *Cal. Grocers Ass'n* v. *Bank of Am.*, 22 Cal.App.4th 205, 214-215 (1994)).

Under California's "sliding scale" approach to unconscionability, if "the procedural unconscionability, although extant, [is] not great," the party attacking the term must prove "a greater degree of substantive unfairness." *Marin Storage & Trucking, Inc.* v. *Benco Contracting & Eng'g, Inc.*, 89 Cal.App.4th 1042, 1056 (2001).

In the particular context of agreements to resolve disputes on an individual basis, however, the California Supreme Court has adopted a unique three-part test. Under that test, such an agreement is unenforceable if it "[(i)] is found in a consumer contract of adhesion [(ii)] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [(iii)] when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank* v. *Super. Ct.*, 36 Cal.4th 148, 162-163 (2005).

3. ATTM's Arbitration Provision. ATTM, which was known as Cingular Wireless until January 2007, provides wireless service to more than 90 million subscribers, with over 10 million in California alone. The wireless service agreements between ATTM and its customers long have required the parties to resolve any disputes they may have via bilateral arbitration. The agreements expressly prohibit

arbitrators from conducting class-wide proceedings. See Pet. App. 3a, 57a, 61a.

ATTM has revised its arbitration provision over time in order to make bilateral arbitration a realistic and effective dispute-resolution mechanism for consumers. The version at issue in this case was promulgated in late 2006.[1]

The arbitration provision affords customers fair, inexpensive, and convenient procedures and, in addition, provides them with affirmative incentives to pursue even small claims on an individual basis.

The procedural safeguards include:

- **Cost-free arbitration for non-frivolous claims:** "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration and arbitrator fees" unless the arbitrator determines that the claim "is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))";[2]
- **Convenience:** Arbitration takes place "in the county * * * of [the customer's] billing address," and for claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which

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[1] The arbitration provision is set forth at Pet. App. 55a-62a.

[2] Even if an arbitrator concludes that a consumer's claim is frivolous, the AAA's consumer arbitration rules would cap a consumer's arbitration costs at $125. Pet. App. 21a n.2.

"the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."

- **Flexible consumer procedures:** Arbitration is conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the independent, non-profit AAA designed with consumers in mind;
- **Small claims court option:** Either party may bring a claim in small claims court in lieu of arbitration;
- **Full remedies available:** The arbitrator may award the claimant any form of individual relief (including statutory attorneys' fees, statutory damages, punitive damages, and injunctions) that a court could award; and
- **No confidentiality requirement:** Customers and their attorneys are not required to keep the results of the arbitration confidential.

The features that are designed to encourage consumers to pursue claims through bilateral arbitration include:

- **$7,500 minimum recovery if arbitral award exceeds AT&TM's last settlement offer:** If the arbitrator awards a California customer relief that is greater than AT&TM's last "written settlement offer made before an arbitrator was selected" but less than $7,500, AT&TM will pay the

customer $7,500 rather than the smaller arbitral award;[3]

- **Double attorneys' fees:** If the arbitrator awards the customer more than AT&T M's last written settlement offer, then AT&T M will "pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[4] and
- **AT&T M disclaims right to seek attorneys' fees:** "Although under some laws [AT&T M] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [AT&T M] agrees that it will not seek such an award [from the customer]."

Moreover, AT&T M has made its arbitration procedures easy to use. A customer need only fill out and mail a one-page Notice of Dispute form that AT&T M

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[3] Under the 2006 provision, the amount of the minimum payment is tied to the jurisdictional maximum of the customer's local small claims court. Pet. App. 60a. In California, the jurisdictional limit for small claims court is $7,500. CAL. CODE CIV. PROC. § 116.221. In 2009, AT&T M revised this aspect of its arbitration provision to make the minimum payment a uniform amount—$10,000—across the country. See http://www.att.com/disputeresolution.

[4] This contractual right to double attorneys' fees "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." Pet. App. 61a. Thus, a customer who does not qualify for this contractual award is entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

has posted on its web site. Pet. App. 22a-23a. AT&TM's legal department generally responds to a notice of dispute with a written settlement offer. *Id.* at 23a. If the dispute is not resolved within 30 days, the customer may invoke the arbitration process by filling out a one-page Demand for Arbitration form (also available on AT&TM's web site) and sending copies to the AAA and to AT&TM. To further assist its customers, AT&TM's web site includes a layperson's guide on how to arbitrate a claim. *Ibid.*

4. The Concepcions' Lawsuit. Customers of most wireless carriers, including AT&TM, typically purchase cell phones and subscribe to wireless service as a bundled transaction, in which the phone is free or steeply discounted in exchange for a commitment to subscribe to service for a specified term (usually one or two years). Pet. App. 18a-19a.

The respondents, Vincent and Liza Concepcion, are AT&TM customers who filed a putative class action against AT&TM in the United States District Court for the Southern District of California. *Id.* at 20a. They allege that they entered into a bundled transaction for wireless service and free or heavily discounted phones. *Id.* at 18a-19a. California requires that sales tax be paid on the full retail value of a phone when it is sold as part of a bundled transaction. CAL. CODE REGS. tit. 18, §§ 1585(a)(4), (b)(3). Despite this requirement, the Concepcions allege that when AT&TM charged them sales tax based on the full retail price of phones that were free or discounted, it violated California's unfair competition and false advertising laws (CAL. BUS. & PROF. CODE §§ 17200 *et seq.*; *id.* §§ 17500 *et seq.*) and Consumer Legal Remedies Act (CAL. CIV. CODE §§ 1750 *et seq.*).

Pet. App. 17a-18a; ER 363-370.[5] They also allege that AT&TM committed fraud and unjustly enriched itself. ER 370-372.

5. Proceedings In The District Court. AT&TM responded to the Concepcions' complaint by moving to compel arbitration. The Concepcions opposed AT&TM's motion, contending principally that AT&TM's arbitration provision is unconscionable under California law because it requires arbitration on a bilateral (as opposed to class-wide) basis. Pet. App. 30a-35a. The district court agreed, holding that, despite its pro-consumer features, the provision failed *Discover Bank*'s three-pronged test for such provisions. *Id.* at 35a, 42a-46a.

In applying the first element of the *Discover Bank* test, the court found that the Concepcions' arbitration agreement was a "contract of adhesion." *Id.* at 35a. Although the court therefore deemed the agreement to be procedurally unconscionable, it held that the agreement is "on the low end of the spectrum of procedural unconscionability." *Id.* at 36a (internal quotation marks omitted).

The district court next held that the Concepcions could not satisfy the second element of the test—*i.e.*, that "predictably small amounts of damages" are at issue. *Id.* at 36a-42a. The court explained that, although AT&TM's arbitration provision "does not change the amount of actual damages at issue ($30), it does exponentially change the amount of potential recovery in arbitration." *Id.* at 37a.

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[5] "ER _" refers to the Excerpts of Record in the court of appeals.

In so doing, the arbitration clause provides customers with a powerful incentive to pursue their claims on an individual basis. As the district court observed:

> If AT&TM denies an informal claim (*i.e.*, the Notice of Dispute) or offers less than the consumer requests—which are the only scenarios that would prompt a consumer to pursue arbitration—the amount of the consumer's award upon prevailing at arbitration jumps to $7,500 (the "Premium") plus double attorney's fees, if the consumer is represented by counsel. With the potential to recover two hundred fifty times one's actual damages, * * * individual claimants are much more likely to pursue arbitration if they are unsatisfied with AT&TM's offer during the informal claims process.

Id. at 37a-38a.

Because AT&TM has committed to pay all arbitration costs and makes special premiums available in arbitration, the district court further found that the provision "prompts AT&TM to *accept liability*"—and to offer to settle for many times the customer's actual damages—"during the *informal claims process*" that precedes arbitration, "even for claims of questionable merit." *Id.* at 39a (emphasis in original). Moreover, the threat of having to pay the premiums gives AT&TM "an incentive to include reasonable attorney's fees in its settlement offers," and as a result it "has a policy of doing so." *Id.* at 38a n.7.

The district court accordingly concluded that, "under the revised arbitration provision, nearly all consumers who pursue the informal claims process

are very likely to be compensated promptly and in full." *Id.* at 40a-41a. Indeed, depending on the size of the claim, "a consumer is virtually guaranteed a payment by AT&TM of up to twenty times * * * his or her actual damages simply by filling out a one-page form to initiate the informal claims process." *Id.* at 39a. "The process is quick, easy to use, and prompts full or, as described by Plaintiffs, even excess payment to the customer *without* the need to arbitrate or litigate." *Ibid.* (emphasis in original).

"In contrast," the district court found, "consumers who are members of a class do not fare as well." *Id.* at 41a. The court cited "studies that show [that] class members rarely receive more than pennies on the dollar for their claims, and that few class members (approximately 1-3%) bother to file a claim when the amount they would receive is small," and noted that the Concepcions "do not dispute these statistics." *Ibid.*

The district court accordingly found that "the record * * * demonstrates that a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.* at 42a. The court thus concluded that AT&TM's revised arbitration provision "sufficiently incentivizes consumers" to pursue "small dollar" claims (*id.* at 39a-40a) and "is an adequate substitute for class arbitration as to this prong of *Discover Bank*" (*id.* at 42a).

The district court nonetheless held that AT&TM's arbitration provision is unenforceable under California law because AT&TM had not disproven the third element of the *Discover Bank* test. As the court in-

terpreted that aspect of *Discover Bank*, the allegations in the complaint must be taken as true and—contrary to the ordinary burden of proof in unconscionability cases—*the party seeking to compel arbitration* must demonstrate that "the arbitration provision is an adequate substitute for the deterrent effect of the class action mechanism." *Id.* at 45a. The court noted that AT&TM had submitted evidence that it dispensed over $1.3 billion in credits in one year to resolve customers' disputes. *Id.* at 44a. But the court held that AT&TM had not shown that its arbitration provision was an adequate substitute for class actions in deterring AT&TM from engaging in wrongdoing of the nature alleged (but not proven) by the Concepcions. *Ibid.*[6] The court proceeded to hold that, although the Concepcions "arguably would be better off" in arbitration, "[f]aithful adherence to California's stated policy of favoring class litigation and [class] arbitration to deter alleged fraudulent conduct * * * compels the Court to invalidate" AT&TM's revised arbitration provision. *Id.* at 46a & 47a n.10.

Finally, the district court rejected AT&TM's argument that "the FAA preempts any holding that AT&TM's arbitration provision is unenforceable under California law." *Id.* at 47a n.11.

6. The Ninth Circuit's Decision. The Ninth Circuit affirmed, holding that AT&TM's arbitration provision is unconscionable under the *Discover Bank* test because it requires customers to arbitrate small consumer claims on an individual basis. Pet. App. 2a. The court reasoned that "[t]he *Discover Bank*

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[6] The court merely accepted, at face value, the Concepcions' assertion that class actions are necessary for deterrence. We discuss below (at pages 45-47) why that assumption is misguided.

rule focuses on whether damages are predictably small, and in the end, the premium payment provision [in AT&TM's arbitration clause] does not transform a $30.22 case into a predictable $7,500 case." *Id.* at 9a-10a.

The Ninth Circuit ignored the Concepcions' concession that it would be economically rational for AT&TM to offer to settle modest claims for up to 20 times their value and the district court's finding that AT&TM's arbitration provision may prompt "excess payment to the customer" (*id.* at 39a). The Ninth Circuit instead stated flatly that "if a customer files for arbitration against AT & T, predictably, AT & T will simply pay the face value of the claim before the selection of an arbitrator to avoid potentially paying $7,500. Thus, the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22." *Id.* at 10a. The court also dismissed the district court's finding that the arbitration provision provides AT&TM compelling incentives to resolve customers' complaints as soon as the customer submits a notice of dispute, stating that "[w]e must determine only whether the premium provides adequate incentive to pursue individual *arbitration*, not informal resolution." *Id.* at 10a n.7 (emphasis in original).

The Ninth Circuit recognized that AT&TM's provision "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim." *Id.* at 11a n.9. But the court continued that "the problem with [the provision] under California law—as we read that law—is that not *every* aggrieved customer will file a claim." *Ibid.* (emphasis added).

In sum, as the Ninth Circuit understood *Discover Bank*, because "[t]he actual damages a customer will

recover remain predictably small, * * * AT & T's class action waiver is in effect an exculpatory clause, hence substantively unconscionable." *Id.* at 11a. Like the district court, the Ninth Circuit made no effort to explain why, given the low level of procedural unconscionability found by the district court, the degree of substantive unconscionability was sufficient to preclude enforcement of ATTM's arbitration provision. Instead, it stated that "[t]he best way to read *Discover Bank* in light of the sliding-scale approach is that, if a contract clause is, in practice, exculpatory, as long as there is any degree of procedural unconscionability, the element of substantive unconscionability is generally adequate, as a matter of law." *Id.* at 13a.

The Ninth Circuit rejected ATTM's FAA preemption argument, declaring that "*Shroyer* [v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007)] controls this case because [ATTM] makes the same [preemption] arguments we rejected there." Pet. App. 12a. The *Shroyer* court had held that the *Discover Bank* rule "'is simply a refinement of the unconscionability analysis applicable to contracts generally in California'" and therefore does not run afoul of Section 2 of the FAA and this Court's cases interpreting it. *Id.* at 12a-13a (quoting *Shroyer*, 498 F.3d at 987).

Turning to ATTM's argument that the court's interpretation of California law would obstruct the purposes of the FAA, the Ninth Circuit indicated that in *Shroyer* it had "identified two purposes: first, to reverse judicial hostility to arbitration agreements by placing them on the same footing as any other contract, and second, to promote the efficient and expeditious resolution of claims." *Id.* at 13a-14a.

Shroyer held that "California unconscionability law did not stand in the way of either of these identified purposes." *Id.* at 14a. As to the former purpose, *Shroyer* reasoned that "'*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.'" *Ibid.* (quoting *Shroyer*, 498 F.3d at 990; emphasis in *Shroyer*). As to the second purpose, *Shroyer* "rejected the 'contention that class proceedings will reduce the efficiency and expeditiousness of arbitration in general.'" *Ibid.* (quoting *Shroyer*, 498 F.3d at 990).

Finally, the Ninth Circuit rejected ATTM's argument that this Court's decision in *Preston* v. *Ferrer*, 552 U.S. 346 (2008), "supercedes [sic] *Shroyer*'s reasoning on this point." Pet. App. 15a. As the Ninth Circuit saw it, "by its terms, *Preston* is inapplicable to our case because the Concepcions are not challenging the validity of the service contract with AT & T as a whole, but only the validity of the arbitration agreement. Likewise, nothing in *Preston* undercuts the rationale of *Shroyer* that the FAA does not impliedly preempt California unconscionability law, because the plaintiffs in *Shroyer* were also challenging only the validity of the arbitration agreement." *Id.* at 16a.

SUMMARY OF THE ARGUMENT

As applied to ATTM's arbitration provision, California's near-categorical ban on arbitration agreements that do not allow for class-wide dispute resolution is preempted by the FAA.

A. Section 2 of the FAA declares that agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable" except under limited circums-

tances. Section 4 of the FAA emphasizes the duty of courts to compel arbitration "in accordance with the terms of the [arbitration] agreement" when the making of such an agreement is not in issue And Section 3 of the FAA requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the [arbitration] agreement."

Together, these provisions of the FAA embody an overarching federal policy "to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks omitted). The Court has emphasized repeatedly that the FAA entitles parties to tailor the procedures of arbitration to their needs (see, *e.g.*, *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008)) and that protestations that the procedures in arbitration are "more streamlined" than in litigation "do not offer a credible basis" for refusing to enforce arbitration provisions as written (*14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1471 (2009)).

State-law rules that purport to dictate the procedures that apply in arbitration must overcome two high hurdles: the FAA's express mandate that courts enforce arbitration agreements according to their terms, subject to only narrow exceptions; and the principle of conflict preemption. California's rule conditioning enforcement of arbitration provisions on the inclusion of a term authorizing class-wide dispute resolution cannot overcome either hurdle.

B. Section 2 of the FAA affirmatively preempts any state-law limitation on the enforceability of arbitration agreements contained in written contracts involving commerce unless that limitation is based

on a ground that exists at law or equity for the revocation of *any* contract. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). The Ninth Circuit held that California's rule invalidating arbitration provisions that do not authorize class-wide dispute resolution is saved from preemption under this exception. That holding is wrong.

1. The Ninth Circuit opined that, because California's rule nominally applies both to arbitration provisions and to other kinds of dispute-resolution contracts, it places arbitration agreements on an even footing and therefore is not preempted. That rationale fails for several reasons.

To begin with, Section 2 specifies that the state-law ground must be applicable to all contracts (*Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443-444 (2006)), not just the small subset of contracts pertaining to dispute resolution. A state-law rule limiting enforceability of arbitration provisions accordingly may escape preemption only if "that law *arose* to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added). California's rule invalidating provisions that don't allow for class-wide dispute resolution plainly did not arise to govern contracts generally.

Moreover, construing the savings clause to allow States to dictate the procedures applicable in arbitration so long as the same procedures are required in litigation would result in the exception swallowing the rule. States could demand that arbitration include all of the procedures of litigation and thereby "chip away at [the FAA] by indirection." *Adams*, 532 U.S. at 122.

Indeed, Congress enacted the FAA in order to overturn the age-old rule that agreements that oust courts of jurisdiction are unenforceable. *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1274 (2009). That rule applied equally to arbitration agreements and to other kinds of dispute-resolution agreements. See *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 & n.10 (1972). The Ninth Circuit's rationale thus would permit resuscitation of the very rule that Congress sought to overturn.

2. The Ninth Circuit also justified California's rule on the ground that it "'is simply a refinement of the unconscionability analysis applicable to contracts generally in California.'" Pet. App. 12a-13a (quoting *Shroyer*, 498 F.3d at 987). As applied in this case, however, California's rule bears no resemblance whatever to the traditional unconscionability principles that apply to contracts generally. California has created a special legal rule applicable only to arbitration agreements.

First, in the context of all contracts other than arbitration agreements, California equates unconscionability with terms that are shocking to the conscience—terms to which only a person under delusion would agree. See pages 3-4, *supra*. Yet the courts below invalidated AT&TM's arbitration provision under the *Discover Bank* test even while acknowledging that any customer who invokes AT&TM's arbitration provision is likely to obtain full relief (if not more) and that "a reasonable person may well prefer" dispute resolution under AT&TM's arbitration provision over participating in a class action. Pet. App. 11a n.9, 39a-42a. Obviously, a person would not be acting under delusion to accept a contract term that "a reasonable person may well prefer."

Second, outside the arbitration context, California courts evaluate the fairness of the contract at issue only with respect to the parties before the court. Here, both courts below agreed that the Concepcions could obtain full relief under ATTM's arbitration provision. *Id.* at 11a n.9, 39a-41a, 47a n.10. In other words, it is fair to them. The courts nonetheless invalidated the arbitration provision because of the perceived impacts of the requirement of bilateral arbitration on *non-parties*. That is a new rule, not a mere refinement of traditional unconscionability analysis.

Third, California's generally applicable unconscionability doctrine turns on the "substantive unfairness" of the challenged contract provision. *Marin Storage*, 89 Cal.App.4th at 1056. But California's rule invalidating arbitration provisions that don't include a term authorizing class-wide dispute resolution turns on social policy concerns relating to deterrence, not substantive unfairness.

Fourth, in cases not involving arbitration provisions, "[t]he critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties—not whether it is unconscionable in light of subsequent events." *Am. Software, Inc.* v. *Ali*, 46 Cal.App.4th 1386, 1391 (1996). By contrast, the *Discover Bank* test requires courts to ignore the many circumstances under which consumers might benefit from ATTM's arbitration provision and focus only on the allegations of the plaintiff's complaint, virtually ensuring that the arbitration provision will be invalidated.

For all of these reasons, affixing the "unconscionability" label cannot salvage California's arbitration-specific rule.

3. The California Supreme Court also sought to support its rule by invoking a statute that bars enforcement of exculpatory clauses. That rationale falls outside Section 2's savings clause as well.

To begin with, it is dubious whether public-policy rules of this sort qualify as a ground at law or equity for the revocation of any contract. Public-policy rules by their nature are targeted at particular kinds of contracts and arise out of concerns that are specific to those categories of contracts. Moreover, public policy is a highly elastic concept that was once the basis for refusing to enforce arbitration agreements. Deeming it a basis for the revocation of any contract would risk undoing through the savings clause what Congress sought to accomplish through the direct command of Section 2.

The Court need not decide here whether a public-policy basis for refusing to enforce an arbitration agreement ever can come within the savings clause, however, because the *Discover Bank* rule does not constitute an even-handed application of California's exculpatory-clause doctrine. To the contrary, it is gerrymandered to target arbitration provisions.

The Ninth Circuit acknowledged that any customer who invokes AT&TM's arbitration provision is likely to be made whole, but said that the arbitration clause was exculpatory under California law because not every customer will choose to pursue a claim. In no other context does California deem contracts to be exculpatory merely because non-parties who are ensured redress if they pursue it may nonetheless voluntarily choose not to. All of the cases in which contracts have been declared exculpatory involve provisions that affirmatively limit remedies.

The requirement of bilateral arbitration in AT&TM's arbitration provision does not do that. As this Court recently explained, "[i]t is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. That has no bearing, however, on [the defendant's] or the plaintiffs' legal rights." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010). With or without a class action, AT&TM remains liable to any customer with a valid claim.

C. California's rule conditioning enforcement of arbitration provisions on the inclusion of a term authorizing class-wide dispute resolution is preempted for the additional reason that it conflicts with the purposes of the FAA as reflected in the text and structure of that statute. It does so in two ways, each of which is independently sufficient to require reversal.

1. The overarching purpose of the FAA—which is evident in the text of Sections 2, 3, and 4—is to ensure enforcement of arbitration agreements according to their terms, particularly terms specifying the procedures to be employed in arbitration. California's rule barring enforcement of agreements that require bilateral arbitration is fundamentally at war with" (*Stolt-Nielsen*, 130 S. Ct. at 1775) that core purpose. Indeed, if California can insist that parties to arbitration agreements allow for class-wide dispute resolution, it equally can insist that they allow for all manner of procedures that are the hallmarks of litigation, but the antithesis of arbitration. It could, in other words, kill arbitration by converting it into litigation.

This Court held in *Preston* that the FAA preempts California's requirement that certain kinds of disputes be submitted to the Commissioner of Labor prior to arbitration because that requirement would "frustrate[]" the FAA's purpose of allowing parties to arbitration agreements to "achieve streamlined proceedings and expeditious results." 552 U.S. at 357-358 (internal quotation marks omitted). California's requirement that parties to arbitration agreements allow for class-wide dispute resolution is preempted for the same reason.

2. More broadly, the text and structure of the FAA embody a "federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That policy would be wholly thwarted by California's rule that parties to arbitration agreements must allow for class-wide dispute resolution.

This Court has recognized that the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Stolt-Nielsen*, 130 S. Ct. at 1776. In a class-wide arbitration, the cost-savings of bilateral arbitration are entirely lost; the risks are multiplied exponentially; yet judicial review is as limited as in a traditional, bilateral arbitration. Moreover, the defendant does not even enjoy certainty that the ultimate arbitral award will have preclusive effect on absent class members. Because class-arbitration is a lose-lose proposition for businesses, no rational business will agree to it. If told that the only way they can have an enforceable arbitration agreement is to allow for class-wide dispute resolution, businesses will give up on arbitration entirely. As Justice Thomas has observed, a "result [that] discourages the use of arbitration

agreements [is] completely inconsistent with the policies underlying the FAA." *Waffle House*, 534 U.S. at 310 (Thomas, J., dissenting). For this reason as well, California's rule conditioning enforcement of arbitration provisions on the inclusion of a term authorizing class-wide dispute resolution is preempted by the FAA.

ARGUMENT

THE FAA PREEMPTS CALIFORNIA'S RULE INVALIDATING ARBITRATION AGREEMENTS THAT DO NOT AUTHORIZE CLASS-WIDE DISPUTE RESOLUTION.

A. The FAA Mandates That Arbitration Provisions Be Enforced According To Their Terms.

Section 2 of the FAA provides that:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to

any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24.

That policy is reinforced in Section 4 of the FAA, which states that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless "the making of the agreement for arbitration or the failure to comply therewith" are called into question. 9 U.S.C. § 4. See also *ibid.* (limiting any jury trial to consideration of the same two issues: "[i]f the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof").

And Section 3 of the FAA requires courts to stay litigation of arbitral claims so that arbitration may be had "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. § 3.

These provisions of the FAA "are integral parts of a whole" (*Bernhardt* v. *Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 201 (1956)), and as such must be read together. This Court accordingly has "said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt Info. Scis., Inc.* v. *Board of Trustees*, 489 U.S. 468, 479 (1989)); see also *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2776 (2010); *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 453 (2003) (plurality op.); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995).

That means that "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract *the rules under which that arbitration will be conducted*." *Volt*, 489 U.S. at 479 (citation omitted; emphasis added); see also *Stolt-Nielsen*, 130 S. Ct. at 1774 (the parties "may agree on rules under which any arbitration will proceed").

The Court has specifically identified "procedure" as one of the "features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall St.*, 552 U.S. at 586; see also *Scherk v. Alberto-Culver Inc.*, 417 U.S. 506, 519 (1974) ("[a]n agreement to arbitrate * * * is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute"). Indeed, the whole point of entering into an arbitration agreement is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

It is thus "clear from [this Court's] precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes" and that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1774-1775 (emphasis in original).

Accordingly, "the recognition that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitration is

one of the chief reasons that parties select arbitration." *Pyett*, 129 S. Ct. at 1471 (emphasis added). Precisely because the entire purpose of arbitration is to provide a less expensive, less time-consuming, and less adversarial alternative to litigation, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve" claims. *Ibid.*

In short, the FAA creates a powerful presumption that parties to arbitration agreements may select the procedures that will govern their arbitration and that courts may not refuse to enforce those agreements merely because they disagree with the procedures so selected.

The statute enforces this presumption by imposing two distinct but related limits on state-law rules applicable to arbitration agreements—the express requirements of Sections 2 and 4 that courts enforce such agreements according to their terms, subject to only narrow exceptions, and the principle of conflict preemption. The state-law rule applied by the courts below to invalidate the arbitration agreement here is invalid under both principles.

B. California's Rule Invalidating Agreements That Require Bilateral Arbitration Is Preempted By Section 2 Of The FAA Because It Is Not A "Ground[] * * * At Law Or In Equity For The Revocation Of Any Contract."

Section 2 of the FAA places "only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract evidencing a transaction involving commerce and such

clauses may be revoked upon grounds as exist at law or in equity for the revocation of any contract." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 (1984) (internal quotation marks and footnote omitted). Any state-law impediment to arbitration that does not fall within one of these exceptions is preempted by the FAA and "must give way." *Perry*, 482 U.S. at 490-491; see also *Casarotto*, 517 U.S. at 687.

The arbitration agreement between AT&TM and the Concepcions expressly requires bilateral arbitration. Pet. App. 61a ("You and AT&T agree that each may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding. * * * [T]he arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.") (emphasis omitted).

The courts below refused to enforce the agreement in accordance with its terms, invoking the savings clause at the end of Section 2, which specifies that courts may decline to enforce arbitration provisions on "such grounds as exist at law or in equity for the revocation of any contract." Their invocation of that exception to declare the requirement of bilateral arbitration unenforceable was fundamentally erroneous.

This Court has recognized that Section 2's savings clause does not protect state laws that discriminate against arbitration agreements. In *Casarotto*, for example, the Montana law imposed a disclosure requirement that applied only to arbitration contracts. This Court deemed the savings clause inapplicable and the statute preempted by Section 2, "because the State's law conditions the enforceability of

arbitration agreements on compliance with a special notice requirement *not applicable to contracts generally*." 517 U.S. at 687 (emphasis added); see also *Preston*, 552 U.S. at 356; *Perry*, 482 U.S. at 491-492 & n.9; *Southland*, 465 U.S. at 10-16.

Here too, California's rule conditioning the enforcement of arbitration agreements on the inclusion of a terms authorizing class-wide dispute resolution runs afoul of this fundamental nondiscrimination principle.

1. The fact that California's rule ostensibly applies to both arbitration and litigation is not sufficient to bring it within the savings clause.

The Ninth Circuit held that, because California's rule invalidating provisions that require bilateral dispute resolution applies equally to arbitration agreements and "contracts that bar class action litigation outside the context of arbitration," the rule places arbitration agreements "'on the *exact same footing*'" as other contracts and therefore is not preempted. Pet. App. 14a (quoting *Shroyer*, 498 F.3d at 990) (emphasis in original). That holding is erroneous for several reasons.

To begin with, Section 2 specifies that the savings clause applies to "grounds * * * for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). "Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with *all other contracts*." *Buckeye Check Cashing*, 546 U.S. at 443 (emphasis added). Accordingly, a state-law defense may be applied to invalidate an arbitration provision only if "that law *arose* to govern issues concerning the validity, revocability,

and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added); accord *Casarotto*, 517 U.S. at 686-687. Needless to say, a rule applicable only to dispute-resolution agreements is not one that "arose to govern * * * contracts generally."

This Court has never held or even hinted that the antidiscrimination principle embodied in Section 2's "any contract" requirement is satisfied so long as the state rule in question nominally applies to both litigation and arbitration. And for good reason. Such a reading of the savings clause would result in the exception swallowing the rule, because States intent on "chip[ping] away at [the FAA] by indirection" (*Adams*, 532 U.S. at 122) easily could devise facially neutral state laws that have the effect of superimposing all manner of procedural requirements on arbitration.

For example, what if California adopted a law precluding any contractual limitations on discovery rights in judicial proceedings and requiring that the same discovery procedures apply in arbitrations? Such a law would apply equally to both arbitral and judicial dispute resolution, but its effect would be to drain arbitration of its benefits. It is inconceivable that Congress could have intended to permit States to burden arbitration in that manner. See also pages 41-42, *infra* (discussing additional examples).

Indeed, the very point of Section 2 was to eliminate an anti-arbitration rule that also applied to other types of dispute-resolution clauses. As this Court has repeatedly explained, before enactment of the FAA, "courts traditionally viewed arbitration clauses as unworthy attempts to 'oust' them of jurisdiction" and so "guard[ed] against encroachment on their domain" by "refus[ing] to order specific enforcement

of agreements to arbitrate." *Vaden*, 129 S. Ct. at 1274 (citing H.R. REP. NO. 96, 68th Cong., 1st Sess., 1-2 (1924)). "The origins of those refusals lie in 'ancient times,' when the English courts fought 'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'" *Allied-Bruce*, 513 U.S. at 270 (quoting *Bernhardt*, 350 U.S. at 211 n.5 (Frankfurter, J., concurring) (quoting in turn *United States Asphalt Ref. Co.* v. *Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915) (quoting in turn *Scott* v. *Avery*, 5 H.L. Cas. 811 (1856) (Campbell, L.J.))).

This judge-made rule against contractual "ousters" of jurisdiction proscribed not only arbitration clauses, but also forum-selection clauses, which were similarly deemed "'contrary to public policy'" because "their effect was to 'oust the jurisdiction' of the court." *M/S Bremen*, 407 U.S. at 9-10; *see also id.* at 10 n.10 (citing cases). Thus, the "ouster" doctrine applied to contractual dispute resolution generally, and was not expressly limited to arbitration. The Congress that enacted Section 2 of the FAA specifically to "attend[] to the problem" posed by "the ancient 'ouster' doctrine" (*Vaden*, 129 S. Ct. at 1274) could not possibly have understood the savings clause to salvage the very rule it sought to overturn.

Finally, even if nominally neutral, state rules targeting only dispute-resolution clauses predictably and inevitably will have a far greater impact on arbitration agreements—whose entire purpose is to allow parties to "specify by contract the rules under which that arbitration will be conducted" (*Volt*, 489 U.S. at 479)—than on any other type of contract. To hold that the savings clause encompasses state rules that apply only to dispute-resolution clauses thus would

as a practical matter allow use of "the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable"—precisely what Section 2 prohibits. *Perry*, 482 U.S. at 492 n.9.

For all of these reasons, California's near-categorical ban on provisions requiring bilateral arbitration is not saved from preemption merely because it ostensibly applies equally to "contracts that bar class action litigation outside the context of arbitration." Pet. App. 14a (internal quotation marks omitted).[7]

2. The fact that unconscionability broadly speaking is a defense applicable to all contracts is not sufficient to bring California's rule within the savings clause.

The Court has identified "fraud, duress, [and] unconscionability" as examples of the state-law grounds that may fall within Section 2's savings clause. *Casarotto*, 517 U.S. at 687. Latching onto the reference to unconscionability in *Casarotto*, the Ninth Circuit held that California's rule invalidating agreements to arbitrate on a bilateral basis is saved from preemption under Section 2's savings clause "'because unconscionability is a generally applicable contract defense.'" Pet. App. 12a (quoting *Shroyer*, 498 F.3d at 988). Here again, the Ninth Circuit was mistaken.

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[7] If a rule limited to dispute-resolution clauses were not invalid on these grounds, moreover, it would still fall outside the savings clause for the same reasons that California may not justify its rule as an ostensibly neutral application of its exculpatory-clause statute. See pages 40-48, *infra*.

"That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration to special scrutiny." *Iberia Credit Bureau*, 379 F.3d at 167 (citing *Perry*, 482 U.S. at 492 n.9); see also *Oblix, Inc.* v. *Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004) (Easterbrook, J.) ("no state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule"). Yet that is precisely what California has done in the case of provisions requiring bilateral arbitration.

To state the obvious, the three-prong *Discover Bank* test bears no resemblance to California's traditional unconscionability standard. Although the Ninth Circuit stated that the *Discover Bank* test "is simply a refinement of the unconscionability analysis applicable to contracts generally in California" (Pet. App. 12a-13a (internal quotation marks omitted)), nothing could be further from the truth. The *Discover Bank* test deviates in at least four significant ways from the traditional unconscionability principles applied by California courts outside the arbitration context.

First, when it comes to all contracts other than ones requiring resolution of disputes on a bilateral basis, California equates unconscionability with terms that shock the conscience and to which no person who is not acting under delusion would agree. See pages 3-4, *supra*. That standard is the same one that prevailed throughout the country at the time of enactment of the FAA. See, *e.g.*, *Hume* v. *United States*, 132 U.S. 406, 411 (1889) (unconscionable con-

tract is one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"); *Eyre* v. *Potter*, 15 How. (56 U.S.) 42, 60 (1853) (doctrine of unconscionability was concerned with "such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon satisfactory ground of fraud; but then, such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud") (citing J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 244, 246 (1835)).

The *Discover Bank* test abandons this traditional standard. The present case proves the point. The district court expressly found that, because of its unique premium provisions, ATTM's arbitration clause "prompts early payment of small dollar claims." Pet. App. 42a.[8] Accordingly, the court found, "a reasonable consumer may well prefer quick informal resolution with likely full payment [under ATTM's arbitration provision] over class litigation that could take months, if not years, and which may

[8] The Ninth Circuit deemed it irrelevant that ATTM has an overwhelming incentive to resolve all colorable claims prior to the actual commencement of arbitration, reasoning that under California law "[w]e must determine only whether the premium provides adequate incentive to pursue individual *arbitration*, not informal resolution." Pet. App. 10a n.7 (emphasis in original). That statement serves only to highlight how far California has strayed from the traditional unconscionability standard.

merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Ibid.*

By definition, a contractual term that "a reasonable consumer may well prefer" cannot be conscience shocking. And it certainly cannot be so extremely conscience shocking as to make up for it being "on the low end of the spectrum of procedural unconscionability," as the district court found ATTM's arbitration provision to be. *Id.* at 36a (internal quotation marks omitted).

Second, when California courts evaluate unconscionability challenges outside the context of provisions that require bilateral arbitration, they consider the fairness of the challenged provision *to the parties* to the agreement before the court: They refuse to enforce contracts that are shockingly unfair to those parties;[9] and they uphold contracts when such shocking unfairness does not exist.[10]

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[9] See, *e.g.*, *Ilkhchooyi* v. *Best*, 37 Cal.App.4th 395, 410 (1995) (invalidating clause conditioning transfer of lease for dry cleaning business on tenant's payment to landlord of 75% of the purchase price of the business because the landlord's "attempt to appropriate a portion of the sale price of the business was blatant overreaching"); *Carboni* v. *Arrospide*, 2 Cal.App.2d 76, 83-84 (1991) (holding that 200% annual interest on a secured loan was unconscionable to borrower); *Ellis* v. *McKinnon Broad. Co.*, 18 Cal.App.4th 1796, 1805-1807 (1993) (invalidating as unconscionable to employee a provision entitling employer to keep commissions received after employee left company).

[10] See, *e.g.*, *Aron* v. *U-Haul Co. of Cal.*, 143 Cal.App.4th 796, 809 (2006) ("$20 fueling fee" and "additional charges for fuel used but not replaced" in truck rental contract "do not shock the conscience as a matter of law" as applied to renter); *Wayne* v. *Staples, Inc.*, 135 Cal.App.4th 466, 483 (2006) (charging customer "a 100 percent markup on [excess-value insurance] cov-

Here, by contrast, the courts below effectively found that AT&TM's arbitration provision is fair to the Concepcions (and, indeed, any customer who invokes it). Pet. App. 11a n.9, 39a-41a, 47a n.10. Numerous other courts have reached the same conclusion.[11]

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erage for which UPS charged only $0.35 per $100" was not unconscionable to customer); *Morris* v. *Redwood Empire Bancorp*, 128 Cal.App.4th 1305, 1324 (2005) (bank's termination fee was not "so harsh or oppressive as to 'shock the conscience'" in light of costs "for all of the services provided by the bank" and "the value [that was] conferred upon the plaintiff"); *Ali*, 46 Cal.App.4th at 1392 (contract terms that allocated the risk of lack of sales between salesperson and employer were not "so unfair or oppressive in [their] mutual obligations" on the parties to be unconscionable); *Vance* v. *Villa Park Mobilehome Estates*, 36 Cal.App.4th 698, 710-711 (1995) (lease term "provid[ing] for periodic increases in rent based on periodic increases in costs" was not unconscionably unfair to tenant).

[11] See, *e.g.*, *Wince* v. *Easterbrooke Cellular Corp.*, 681 F.Supp.2d 679, 685 (N.D. W. Va. 2010) (AT&TM's provision gives each customer "incentive to bring his or her claim, regardless of whether classified as 'high' or 'small' dollar," and "in light of these remaining incentives, the class action restriction cannot be deemed unfair"); *Moffat* v. *Comme'ns, Inc.*, 2010 WL 451033, at *2 (E.D. Mich. Feb. 5, 2010) (because of the premiums available under AT&TM's provision, a consumer's "potential recovery" in arbitration "exceeds the value in time and energy required to arbitrate her claims"); *Makarowski*, 2009 WL 1765661, at *3 (AT&TM's arbitration clause "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen"); *Strawn* v. *AT&T Mobility, Inc.*, 593 F.Supp.2d 894, 900 n.6 (S.D. W. Va. 2009) (AT&TM's arbitration clause is "unusually consumer-centered"); *Francis* v. *AT&T Mobility LLC*, 2009 WL 416063, at *5 (E.D. Mich. Feb. 18, 2009) (AT&TM's clause is "fair" to consumers); see also *Cruz* v. *Cingular Wireless, LLC*, 2008 WL 4279690, at *3 (M.D. Fla. Sept. 15, 2008) ("[i]n this case, there is no limitation on attorneys' fees, and under certain circumstances, customers may be entitled to double their attorneys' fees," and "there is no question that the arbitration agreement provides all the same remedies available to plaintiffs under

Because AT&TM's arbitration provision undeniably is fair to the Concepcions, the finding of "unconscionability" rests entirely on concern for the rights of persons *other than* the parties to the agreement before the court: the third parties who would be included within a hypothetical class action. That standard finds no support in California's generally applicable unconscionability principles.

We have not located a single precedential California decision holding a contract term unconscionable because of its effects on non-parties to the litigation. Indeed, in an unpublished, non-precedential decision, the California Court of Appeal itself recently observed that it was not aware of "any statute or case authorizing application of the doctrine of unconscionability for the benefit of nonparties to the contract," and criticized the attempt to "us[e] a contract doctrine to vindicate social policy." *Lynwood Redevelopment Agency* v. *Angeles Field Partners, LLC*, 2009 WL 4690213, at *8 (Cal. Ct. App. Dec. 10, 2009) (rejecting contention that contract between local development agency and developers was unenforceable because it allegedly was unconscionably unfair to voters).

This plainly discriminatory application of California's unconscionability principles—basing a finding of unconscionability solely on the impact of the

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[Florida's consumer-protection statute"), *appeal pending*, No. 08-16080-CC (11th Cir. argued Nov. 17, 2009); *Davidson* v. *Cingular Wireless LLC*, 2007 WL 896349, at *8 (E.D. Ark. Mar. 23, 2007) (finding that AT&TM's arbitration clause "requires Cingular to pay the full cost of arbitrating any non-frivolous claims," "does not require confidentiality," "does not prohibit punitive damages," and "affords subscribers a convenient arbitral forum").

challenged provision upon third parties—is precluded by Section 2.

Third, California's generally applicable unconscionability test looks to the "substantive unfairness" of the challenged contract provision. *In re Marriage of Bonds*, 24 Cal.App.4th 1, 16 (2000); *Marin Storage*, 89 Cal.App.4th at 1056; see also pages 34-35 and notes 9-10, *supra* (discussing cases).

The inquiry with respect to provisions that require bilateral arbitration, by contrast, turns—as the district court put it—on "California's stated policy of favoring class litigation and [class] arbitration to deter alleged fraudulent conduct." Pet. App. 46a. This sharp difference in the governing standard—looking to social policy concerns relating to deterrence rather than fairness to the contracting parties—also demonstrates impermissible discrimination.

Fourth, California's codification of its unconscionability principle states that "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable *at the time it was made*[,] the court may refuse to enforce the contract." CAL. CIV. CODE § 1670.5(a) (emphasis added). Applying this rule in a case involving a provision that specified that commissions would not be paid to former employees on sales completed 30 days after the end of employment, the California Court of Appeal explained that "[t]he critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties—not whether it is unconscionable in light of subsequent events." *Ali*, 46 Cal.App.4th at 1391.

The court there rejected the unconscionability claim, which rested "largely on events that occurred

several years after the contract was entered into," because "[w]hen viewed in light of the circumstances as they existed * * * when the instant contract was executed, we cannot say the contract provision with respect to compensation after termination was so unfair or oppressive in its mutual obligations as to 'shock the conscience.'" *Id.* at 1392; see also *West* v. *Henderson*, 227 Cal.App.3d 1578, 1588 (1991) (challenged "provision * * * was not unconscionable when [plaintiff] signed the lease").

Under the *Discover Bank* test, by contrast, the unconscionability of a provision requiring bilateral arbitration is determined in view of the allegations made in a particular lawsuit. See 36 Cal.4th at 162-163 (third factor is whether "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money").

This distinction makes a huge difference. Evaluating an agreement as of the time of contracting—*i.e.*, *ex ante*—requires a court to assess the fairness of the challenged contractual provision in the context of all of the circumstances in which it could apply. Here, for example, AT&TM's arbitration provision provides customers with significant benefits, in comparison to the litigation system, with respect to claims that are not susceptible to class treatment. See *Makarowski*, 2009 WL 1765661, at *3; cf. Pet. App. 41a-42a, 47a n.10 (even customers whose claims are susceptible to class treatment may be better off with bilateral arbitration under AT&TM's arbitration provision). The ease of obtaining subsidized access to an impartial decisionmaker, augmented by the premium provisions, enable a customer to press claims that would be uneconomical to pursue in court. Cf. *Oblix*,

374 F.3d at 491 ("Employees fare well in arbitration with their employers—better by some standards than employees who litigate, as the lower total expenses of arbitration make it feasible to pursue smaller grievances and leave more available for compensatory awards.").

An assessment as of the time of contracting might conclude that these benefits more than outweigh the impact upon the customer—and even upon third parties (but see pages 34-37, *supra*)—of the preclusion of class procedures. In contrast, by basing the analysis on the allegations raised in a particular lawsuit months or years after contracting—*i.e.*, *ex post*—the *Discover Bank* test requires courts to ignore the range of possible circumstances to which the provision at issue might apply, greatly increasing the likelihood of the bargain being struck down. Because California takes an *ex post* approach to determining unconscionability *only* when provisions requiring bilateral arbitration are at issue, the *Discover Bank* test represents an extreme departure from generally applicable unconscionability principles, not "simply a refinement" (Pet. App. 12a) of those principles. It therefore does not come within Section 2's savings clause.

3. The fact that California's rule is ostensibly derived from California's prohibition against exculpatory contracts is not sufficient to bring it within the savings clause.

The *Discover Bank* Court justified its rule by reference to a state law declaring exculpatory contracts contrary to the State's public policy. 36 Cal.4th at 162-163. That statute provides:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

CAL. CIV. CODE § 1668.

As a threshold matter, it is not at all clear that a state-law rule of this type—declaring a particular type of contract or contract provision invalid on public-policy grounds—qualifies as a "ground[] * * * at law or in equity for the revocation of any contract" within the meaning of Section 2. Certainly, this Court has never recognized it as such. Cf. *Casarotto*, 517 U.S. at 687 (identifying "fraud, duress, [and] unconscionability" as examples of such grounds).

Public-policy rules targeting specific types of contract provisions do not apply to "any contract," as Section 2 requires. Rather, each rule focuses on a particular type of contract or contract provision. And—in contrast to doctrines such as unconscionability, duress, and fraud, which (properly construed) involve the application of general principles to all contracts—each public-policy rule rests upon policy concerns specific to the type of contract or clause to which it applies, and different from the policy concerns underlying other public-policy rules.

In addition, the breadth and malleability of "public policy" would enable States to target arbitration agreements, while purporting to advance a neutral policy. This is no idle concern. The FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American

courts." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Specifically, "early common law * * * regard[ed] arbitration agreements with extreme disfavor as being contrary to public policy and as ousting the courts of their legitimate jurisdiction." *Atl. Fruit Co.* v. *Red Cross Line*, 276 F. 319, 321 (S.D.N.Y. 1921), aff'd, 5 F.2d 218 (2d Cir. 1924). To construe Section 2 of the FAA to include "public policy" as a basis for refusing to enforce an arbitration provision would invite the resuscitation of judicial hostility to arbitration.

Because "public policy" is so malleable—and thus subject to manipulation—States easily could identify policy reasons for requiring arbitrators to conduct jury trials, employ the rules of civil procedure and evidence, publish their decisions, and give collateral estoppel effect to prior arbitral decisions, thereby effectively converting arbitration into litigation. Cf. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959) (the FAA was enacted to overrule "a great variety" of judicial "devices and formulas" declaring arbitration agreements "against public policy").[12]

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[12] The contract principles that the Court has referenced in connection with Section 2—fraud, duress, and unconscionability—all relate to whether enforcing the agreement is consistent with the party-autonomy principle underlying contract law. An early decision interpreting the parallel provision of the New York arbitration statute on which Section 2 of the FAA is based referred to another provision of New York law that focused on whether "the making of the contract * * * [was] in issue." *In re Gen. Silk Importing Co.*, 194 N.Y.S.2d 15, 19-20 (App. Div.), aff'd *sub nom. Gen. Silk Importing Co.* v. *Gerseta Corp.*, 234 N.Y. 513 (1922) (per curiam); see also 9 U.S.C. § 4 (district court "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless the

However, the Court need not resolve here the question whether public-policy rules ever may come within the scope of Section 2's savings clause, because, even if they could, Section 2 would bar the application of such rules in a manner that discriminates against arbitration agreements. Just as the *Discover Bank* rule cannot be justified as an even-handed application of California's unconscionability principle, it similarly cannot be justified as a nondiscriminatory application of the exculpatory-clause statute. Rather, the State has devised a special legal rule for this particular context. That is precisely what Section 2 prohibits.

The district court found that the Concepcions likely would be better off pursuing bilateral arbitration under AT&TM's arbitration clause than participating in a class action. Pet. App. 39a-41a, 47a n.10. The Ninth Circuit agreed that "[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim." *Id.* at 11a n.9. Thus, AT&TM's arbitration provision is not "exculpatory" in any ordinary sense of the term.

Yet both courts nonetheless held the arbitration provision to be an unenforceable exculpatory clause under *Discover Bank*. As the Ninth Circuit understood it, a provision requiring bilateral arbitration is

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"making of the agreement for arbitration" or the failure to comply with the agreement's terms are in issue). Public-policy rules do not implicate the party autonomy principle. 2 E. FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1, at 3 (3d ed. 2004) (contract law principles relating to "misrepresentation, duress, and undue influence" are "intended to assure that bargaining has taken place in a manner compatible with the public interest in party autonomy," while public policy rules serve different purposes).

"exculpatory" and hence unenforceable under *Discover Bank* so long as "not every aggrieved customer will file a claim." *Ibid.* In other words, because some customers may not feel aggrieved—a high likelihood in this particular case (see *id.* at 45a (acknowledging this possibility))—an arbitration clause that provides a powerful means of redress for those who do feel aggrieved is nonetheless deemed "exculpatory" under *Discover Bank*'s application of Section 1668. This is a wildly idiosyncratic interpretation of the exculpatory-clause statute that applies only to provisions that require bilateral arbitration.

In the first place, this application of the exculpatory-clause statute is "novel" (*Oblix*, 374 F.3d at 492) because it focuses on potential impacts on non-parties, as opposed to solely the party before the court. California courts applying the statute in other contexts base their decisions on whether the challenged contract provision impermissibly infringes a contracting party's ability to vindicate *his or her* rights. See, *e.g.*, *Tunkl* v. *Regents of the Univ. of Cal.*, 60 Cal.2d 92 (1963) (hospital patient's waiver of malpractice claims as a condition of treatment); *Smoketree-Lake Murray, Ltd.* v. *Mills Concrete Constr. Co.*, 234 Cal.App.3d 1724, 1741 (1991) (Section 1668 "applies to exculpatory clauses, releases or other provisions seeking to obtain an exemption or waiver of liability from the injured party"). Indeed, we have not located any decision outside the context of provisions requiring that disputes be resolved bilaterally in which a contract provision was held invalid under Section 1668 based solely on its effect on an alleged wrongdoer's liability to non-parties.

And if focusing on the impacts of a contract on liability to non-parties were not "novel" enough, the

Ninth Circuit's application of the exculpatory-clause rationale in this case depended on a prediction that non-party customers who would be assured full redress were they to pursue a claim nonetheless would elect not to. We have not located a single case outside the arbitration context in which a contractual provision was deemed "exculpatory" based on a prediction that someone will *voluntarily* elect not to pursue an available remedy. All of the cases applying the exculpatory-clause statute outside the arbitration context involve affirmative limitations on the ability to pursue legal rights and remedies.[13]

The arbitration agreement does *not* impose any such limitations. To the contrary, AT&TM remains liable to all of its customers for all wrongdoing. As this Court recently explained:

> A class action * * * merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. * * * [I]t leaves the parties' legal rights and duties intact and the rules of decision unchanged.
>
> [A defendant's] aggregate liability * * * does not depend on whether the suit proceeds as a class action. Each of the * * * members of the putative class could * * * bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to

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[13] To be completely precise, a few cases hold that Section 1668 invalidates provisions indemnifying parties for their willful misconduct, but they have been repudiated by the California Supreme Court. *See Safeco Ins. Co. of Am.* v. *Robert S.*, 26 Cal.4th 758, 767 (2001).

> join a class action. That has no bearing, however, on [the defendant's] or the plaintiffs' legal rights.

Shady Grove, 130 S. Ct. at 1443.

The district court understood *Discover Bank* as being predicated on the concern that a provision requiring traditional, bilateral arbitration "*may* 'serve[] as a disincentive for [a party with superior bargaining power] to avoid the type of conduct that might lead to class action litigation in the first place.'" Pet. App. 46a (quoting *Discover Bank*, 36 Cal.4th at 159) (alterations by the district court; emphasis added).

But a whole host of federal and state agencies—including the Federal Communications Commission, the Federal Trade Commission, the state attorneys general, and the state public utility commissions—are empowered to police systematic wrongdoing by telephone companies. See *Iberia Credit Bureau*, 379 F.3d at 175 (identifying the fact that Louisiana attorney general can seek restitution on behalf of a class of aggrieved customers as one reason why it was not unconscionable to require bilateral arbitration).

Although the California Supreme Court perfunctorily dismissed the notion that government regulation could serve as an "adequate substitute[]" for the deterrent effect of a class action (*Discover Bank*, 36 Cal.4th at 163), it offered nothing but *ipse dixit* to support its belief. This Court has held, however, that speculation is not a valid basis for refusing to enforce an arbitration clause. In *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000), the plaintiff argued that an arbitration agreement that did not specify who would bear the costs of the

arbitration was unenforceable because of the risk that consumers would be deterred from pursuing their claims under the Truth in Lending Act. Rejecting that contention, the Court explained that "[t]he 'risk' that [the consumer] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." 531 U.S. at 91. Rather, the party seeking to avoid enforcement of an arbitration agreement "bears the burden" of proving that the agreement is likely to thwart vindication of his or her claims. *Id.* at 91-92. Here too, the proposition that the threat of enforcement action by regulators, combined with full payment of all colorable individual claims (see Pet. App. 11a n.9, 39a-41a), might be insufficient to deter systematic wrongdoing is "too speculative to justify the invalidation of an arbitration agreement."[14]

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[14] The district court reasoned that because not all customers would pursue claims under AT&M's arbitration clause, "[f]aithful adherence to California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct," compelled it to invalidate the arbitration provision. Pet. App. 46a. But that court also expressly found that "few class members * * * bother to file a claim when the amount they would receive is small." *Id.* at 41a. And it is beyond peradventure that "[a] court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims." *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting). Accordingly, California's professed belief that class actions are necessary for deterrence boils down to the proposition that deterrence is served by imposing on all businesses—without regard to culpability—the massive costs of discovery that typically precede a class certification motion and the inevitable multi-million-dollar fee award extracted by the class-action attorneys as the price of peace. In other words, because class actions *always* cost vast amounts to defend and eventually settle with a large transfer of wealth from the defendant to the class-action

In short, even accepting the Ninth Circuit's belief that AT&TM's arbitration clause reduces AT&TM's "aggregate liability" (*id.* at 11a), the clause does not immunize AT&TM from all liability. In that respect as well, California's application of the exculpatory-clause statute here rests on principles different from the state-law rules applied outside the arbitration context.

* * * * *

Thus, it is only by applying a state-law rule that is "not applicable to contracts generally" (*Preston*, 552 U.S. at 356), but instead is aimed directly at agreements to resolve disputes—almost invariably, arbitration agreements—that the courts below could deem AT&TM's arbitration provision unenforceable. If allowed to stand, California's distortion of contract-law principles in the context of agreements to arbitrate on a bilateral basis would rend a gaping hole in the FAA, as States could deem "unconscionable" or "exculpatory" any arbitration clause that fails to provide for particular favored procedures (such as trials by jury, plenary discovery, motion practice, or written rulings). Because California law "conditions the enforceability of arbitration agreements on compliance with a special [unconscionability rule] not applicable to contracts generally," the FAA "displac-

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lawyers no matter how guiltless the defendant may be, *all* businesses will be deterred from engaging in misconduct by the very existence of this externality-producing procedure. That kind of rationale has no more place here than it does elsewhere in the law. Cf. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417-418 (2003) ("'[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue.'") (quoting *Pac. Mut. Life Ins. Co* v. *Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)) (alteration by the Court).

es" California law "with respect to arbitration agreements covered by the Act." *Casarotto*, 517 U.S. at 687.

C. California's Rule Invalidating Agreements To Arbitrate On A Bilateral Basis Is Preempted Because It Conflicts With The FAA.

California's rule is invalid for a second, independent reason. It is preempted under established principles of conflict preemption. As this Court recently explained, "[t]he FAA's displacement of conflicting state law is 'now well-established,' * * * and has been repeatedly reaffirmed." *Preston*, 552 U.S. at 353 (quoting *Allied-Bruce*, 513 U.S. at 272).

Here, California's rule conflicts with the FAA in two ways. Each conflict provides sufficient grounds for preemption of the state law.[15]

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[15] Justice Thomas recently expressed skepticism about "implied pre-emption doctrines that wander far from the statutory text." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring in the judgment). In Justice Thomas's view, "[t]he Supremacy Clause * * * requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, *or necessarily follow from*, the statutory text * * *." *Id.* at 1207. "Congressional and agency musings" do not satisfy that requirement. *Ibid.* Instead, "evidence of pre-emptive purpose must be sought in the text *and structure* of the provision at issue." *Ibid.* (internal quotation marks and brackets omitted; emphasis added).

The conflict-preemption argument here is not based on "generalized notions of congressional purpose," but instead is firmly rooted in "the text and structure" of the FAA. Specifically, Section 4 of the FAA emphasizes that when the making of an arbitration provision is not at issue, courts must "direct[] the parties to proceed to arbitration *in accordance with the terms of*

1. California's rule conflicts with the FAA's purpose—which is evident in the text and structure of the statute—of allowing parties to select their own dispute-resolution procedures.

As we have already discussed (see pages 24-26, *supra*), the core purpose of the FAA—reflected in the text of Sections 2, 3, and 4—was to ensure enforcement of agreements to arbitrate in accordance with their terms, especially the terms governing the procedures to be applied. California's rule conditioning the enforcement of arbitration provisions on the inclusion of a term permitting class-wide dispute resolution squarely conflicts with that core purpose.

To begin with, it is self-evident that conditioning enforcement of an arbitration provision on inclusion of a term adopting a particular procedure—here, class-wide dispute resolution—is "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775.[16]

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the agreement." (emphasis added). In combination with Section 2, which provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable," Section 4 constitutes a statutory requirement that courts enforce arbitration provisions "according to their terms" (*Rent-A-Center*, 130 S. Ct. at 2776)—particularly when it comes to the procedures specified by the parties (*Pyett*, 129 S. Ct. at 1471). Preemption under the FAA is thus based not on "musing about goals or intentions" (*Wyeth*, 129 S. Ct. at 1215 (Thomas, J., concurring in the judgment)), but rather on the very text and structure of the FAA.

[16] This is not to say that the FAA precludes States from imposing a general standard—such as a requirement that the parties' chosen procedures ensure that claims feasibly can be vindicated

Moreover, if States can "superimpos[e] class action procedures on a contract arbitration" (*Southland*, 465 U.S. at 8), there would be no end to the other procedures on which they could insist. Indeed, they could effectively condition enforcement of arbitration agreements on abandonment of all of the procedural efficiencies that make arbitration desirable in the first place.

For example, concerned that traditional arbitration hinders parties situated similarly to the plaintiff from learning of infringements of their legal rights, a State could condition enforcement of arbitration agreements on inclusion of a requirement that the arbitration decision be published. Or, convinced of the superiority of jury trials, a State could insist that arbitration agreements require arbitrators to convene juries (either with or without the assistance of the judiciary) to resolve factual issues. Or, dissatisfied with the more limited scope of discovery in traditional arbitration, a State might condition enforcement of arbitration agreements on their incorporation of the state or federal rules of civil procedure.

The scope of the procedures that States could impose on arbitration would be limited only by their imagination. In the end, arbitration would be converted into litigation, and the FAA would be rendered a nullity. As the Fifth Circuit has explained, if States can insist that arbitration embody *any* characteristic of litigation, they can insist on "*all* of the procedural accoutrements that accompany a judicial proceeding," which would amount to "an attack on

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in arbitration—so long as it leaves it to the parties to select those procedures.

the character of arbitration itself." *Iberia Credit Bureau*, 379 F.3d at 175-176 (emphasis added).

That was the basis of the Court's preemption holding in *Preston*, which involved a provision of the California Talent Agents Act ("TAA") that required disputes under that Act to be submitted to California's Labor Commissioner in the first instance—prior to either litigation or arbitration.[17]

Noting that "[t]he FAA's displacement of conflicting state law is 'now well-established,'" the Court held that "the FAA supersedes" the California statute. *Preston*, 552 U.S. at 353, 359 (quoting *Allied-Bruce*, 513 U.S. at 272). As the Court observed, "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 357 (quoting *Mitsubishi Motors*, 473 U.S. at 633). That objective "would be frustrated" by the TAA, the Court explained, because "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." *Id.* at 358. Because of that clear conflict between the state-law rule and the federal-law principle, the state law was preempted.

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[17] The TAA did contain an exemption to this exhaustion requirement for arbitration agreements between talent agents and their customers if the agreements provided for notice to the Labor Commissioner and an opportunity to attend the hearing. But the Court found this exemption to be "of no utility" to the petitioner, who "would have been required to concede a point fatal to his claim for compensation—*i.e.*, that he is a talent agent, albeit an unlicensed one—and to have drafted his contract in compliance with a statute that he maintains is inapplicable." *Preston*, 552 U.S. at 356.

Here, as in *Preston*, California has insisted on superimposing its own preferred procedures on a contractual arbitration. In *Preston*, the respondent contended that enforcing his arbitration agreement without the overlay of the TAA's exhaustion requirement "would undermine the Labor Commissioner's ability to stay informed of potentially illegal activity * * * and would deprive artists protected by the TAA of the Labor Commissioner's expertise." 552 U.S. at 358. This time the proffered rationale is that the agreement to arbitrate on an individual basis interferes with the state policy of using class actions to "deter" corporate misconduct. But as in *Preston*, because the arbitration agreement requires the Concepcions to "relinquish[] no substantive rights" (*id.* at 359), state law must give way.[18]

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[18] Although not a preemption case, *Gilmer* reinforces *Preston*'s holding that state policy cannot trump the FAA when the arbitration provision does not require relinquishment of substantive rights. In *Gilmer*, this Court rejected a plaintiff's exhortation to declare claims under the Age Discrimination in Employment Act ("ADEA") non arbitrable. The Court disagreed with the suggestion that the "important social policies" (500 U.S. at 27) of the ADEA would be undermined because of the inability to pursue claims on a class-wide basis, explaining that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* at 32 (alterations in original; internal quotation marks omitted). Instead, the Court held, "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (internal quotation marks omitted; alterations in original); see also *Randolph*, 531 U.S. at 90. If that is

2. California's rule will frustrate the FAA's purpose—reflected in the text and structure of the statute– of removing impediments to arbitration.

The entire text and structure of the FAA in general, and Section 2 in particular, embody a "federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24. If upheld, California's rule conditioning enforcement of arbitration provisions on the inclusion of a term authorizing class-wide dispute resolution will frustrate that policy because businesses will give up on arbitration altogether rather than subject themselves to the risk of a class arbitration. As this Court recently recognized, the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Stolt-Nielsen*, 130 S. Ct. at 1775-1776.

To begin with, "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* at 1775. By contrast, class action arbitration is every bit as burdensome, expensive, and time-consuming as class-action litigation—if not more so.[19] Indeed, class arbitration

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so when federal policy is concerned, it is all the more so when state policy is concerned.

[19] For example, the AAA's class arbitration procedures largely duplicate the Federal Rules of Civil Procedure—with the exception that they provide that, once the arbitrator issues a "class determination award," the parties may move to vacate or confirm that interim award in the district court. See generally AAA, *Policy on Class Arbitrations*, *at* http://www.adr.org/Classarbitrationpolicy.

is the quintessential example of arbitration "mutat[ing] into a private judicial system that looks and costs like the litigation it's supposed to prevent." Todd Carver & Albert Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV. 120, 120 (May 1994).[20]

Meanwhile, "the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited." *Stolt-Nielsen*, 130 S. Ct. at 1776 (citation omitted). Unlike in court, where appellate review of class-certification and merits determinations is robust, the standard for vacating an arbitrator's decision on such issues is "among the narrowest known to law." *Dominion Video Satellite, Inc.* v. *Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Consistent with the "national policy favoring arbitration," the FAA provides only "the limited review needed to maintain arbitration's essential virtue of

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[20] That is why class arbitration was virtually unheard of before this Court's decision in *Bazzle*. As one academic reported in 2000, despite "an extensive effort" to locate attorneys who had participated in class arbitrations, her research "found just a handful," indicating that "very few arbitrations have been handled as class actions." Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38-41 & n.148 (2000). Indeed, it was not until 2003, in the wake of *Bazzle*—which raised the possibility that an arbitration agreement not expressly requiring parties to proceed on an individual basis might be construed to permit class arbitrations—that the major arbitration providers first promulgated rules for class arbitrations. David Clancy & Matthew Stein, *An Uninvited Guest: Class Arbitrations and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 56 & n.1 (2007).

resolving disputes straightaway." *Hall St. Assocs.*, 552 U.S. at 588. Accordingly, an arbitrator's rulings regarding class certification, the scope of any class, the admissibility of expert testimony or other important evidence, whether or not the claim was proven, and the amount of damages can rarely, if ever, be disturbed by a court.

Moreover, even if a defendant wins a class-wide arbitration, it can have no assurance of finality because absent class members may contend that they were not afforded the due process protections necessary to make a class-wide award binding on them. Because many courts have held that arbitrators designated by contracts between private parties are not bound by the U.S. Constitution's due process clauses (see Carole Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 187 n.5 (2006) (citing cases)), there is a risk that courts will embrace such an argument. See also Edward Bilich, *Consumer Arbitration: A Class Action Panacea*, 7 CLASS ACTION LITIG. REP. (BNA) 768, 771 (2006) (because of the "deferential standard of review" of arbitrators' decisions there is "no assurance that the 'class' arbitration proceedings would be binding on absent class members").

Given the risks entailed in *class* arbitration and the absence of any offsetting benefits, no rational business would willingly subject itself to this worst-of-both-worlds scenario. Indeed, in response to prior decisions of the Ninth Circuit refusing to find California's policy favoring class actions preempted by the FAA, the nation's largest cable company, Com-

cast Corp., has already abandoned arbitration in California.[21]

Accordingly, California's rule conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration is for all practical purposes a ban on consumer arbitration agreements. As such, California's rule cannot be reconciled with the FAA's policy of promoting arbitration. See *Waffle House*, 534 U.S. at 310 (Thomas, J., dissenting) (a "result [that] discourages the use of arbitration agreements * * * is * * * completely inconsistent with the policies underlying the FAA"); see also Tr. of Oral Argument at 53, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634) (Apr. 22, 2003) (Justice Scalia: "Why isn't the Federal Arbitration Act more reasonably interpreted as directed at those State laws that * * * are destructive of arbitration, that * * * are hostile not in the sense of any * * * mental intent, but that in their operation make it difficult for parties to enter into arbitration agreements?"), *available at* 2003 WL 1989562. Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" (*United States* v. *Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks omitted)) in enacting the FAA, California's near-categorical ban on provisions requiring bilateral arbitration is preempted.[22]

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[21] See Comcast Agreement for Residential Services § 13.k, *at* http://www.comcast.net/terms/subscriber/ ("IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE").

[22] See, *e.g.*, *Bonito Boats, Inc.* v *Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (state law protection of unpatentable inventions was preempted because it "could essentially redirect

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years"); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 635 (1982) (federal securities laws preempted state tender offer regulation, which gave "incumbent management * * * a powerful tool to combat tender offers," because "[t]hese consequences are precisely what Congress determined should be avoided"); see also *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (ERISA, which has the purpose of promoting regulated plans' flexibility in providing coverage, would preempt a state law that "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage").

APPENDIX

APPENDIX A

Excerpts Of Relevant Constitutional And Statutory Provisions

The Supremacy Clause of the Constitution (Art. VI, cl. 2), provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, provides in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending * * *

> shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement * * *.

Section 4 of the FAA, 9 U.S.C. § 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 * * * for any order directing that such arbitration proceed in the manner provided for in such agreement. * * * [U]pon being satisfied that the making of the agreement for arbitration * * * is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * * If the jury find that an agreement was made in writing * * *, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Class-action bans are provisions in standard form contracts that purport to bar consumers or employees from pursuing classwide proceedings in any forum. In circumstances where they would function as exculpatory clauses, class-action bans have been held unenforceable under the generally applicable contract law of twenty States—without regard to whether they are found in arbitration agreements.

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The question presented is:

> When a class-action ban that is otherwise unenforceable under generally applicable contract law is embedded in an arbitration agreement, is the contract law preempted by the FAA?

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INTRODUCTION

Claiming that its arbitration agreement is more "consumer friendly" than others despite its class-action ban, AT&T seeks to transform a factbound state law question of unconscionability into a question of federal preemption. But the question whether a contractual provision offends generally applicable state law is a matter that the Federal Arbitration Act (FAA) leaves to the States, so long as state law does not discriminate against arbitration. The FAA makes arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under that savings clause, "States may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). The California courts, like many others, have applied general contract law to hold that class-action bans in adhesion contracts that effectively exculpate defendants from liability are unenforceable, without regard to whether the bans are part of arbitration agreements. Because the applicable state law does not treat arbitration agreements "in a manner different from that in which it otherwise construes nonarbitration agreements," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), the FAA does not preempt it.

From reading AT&T's brief, one might think California had struck out on its own in its approach to the enforceability of class-action bans. In fact, courts applying the general contract law of at least twenty States have held that provisions purporting to bar consumers or employees from pursuing classwide relief in any forum may be unenforceable. If California's highest court has distorted its own common law, as AT&T contends, then so have the highest courts of Alabama, Illinois, Massachu-

setts, Missouri, New Jersey, New Mexico, North Carolina, South Carolina, West Virginia, and Washington. So too have courts applying the law of Arizona, Delaware, Florida, Georgia, Michigan, Ohio, Oregon, Pennsylvania, and Wisconsin. Even if the fidelity of these courts to state common-law principles were relevant to the issue of FAA preemption, it would be an unprecedented incursion on State sovereignty for this Court to conclude that so many States have been untrue to their own law.

One might also think, from reading AT&T's brief, that the enforceability of class-action bans is a question arising only in the context of arbitration, or that state contract law treats class-action bans in arbitration agreements differently from class-action bans in other agreements. To the contrary, courts have found class-action bans unenforceable in cases having nothing to do with arbitration agreements. The first California appellate decision on point was such a case. Thus, the States have been true to their word: They have found class-action bans unenforceable under general principles of contract law, without regard to whether they are embedded in arbitration agreements. Such decisions are not merely facially nondiscriminatory, but nondiscriminatory in purpose and effect.

"To immunize an arbitration agreement from judicial challenge," despite its unlawfully exculpatory effect, "would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967). Requiring the enforcement of exculpatory clauses *only* when they are embedded in arbitration agreements would not "make arbitration agreements as enforceable as other contracts," but "more so." *Id.*

STATEMENT

1. AT&T's wireless service agreement purports to bar its customers from seeking classwide relief in any forum:

> **YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.**

Pet. App. 61a (emphasis in original). The agreement also forecloses injunctive relief that extends beyond a customer's "individual claim" to halt systemic fraud or deceptive practices. *Id.* Both the class-action ban and the injunctive-relief limitation are embedded within an arbitration provision. The agreement also allows either party to bring an action in small claims court, subject to the class-action ban. *Id.* at 58a.

Under the agreement's "blowup clause," if the class-action ban is "found to be unenforceable, then the entirety of this arbitration provision shall be null and void," and any class action must be litigated in court. *Id.* at 61a.

Despite the class-action ban, AT&T describes its agreement as "consumer friendly" because AT&T promises to pay "premiums" if an arbitrators' award exceeds a settlement offer. As the court of appeals explained, however, the agreement permits AT&T to buy off small claimants for the face amount of their claim, ensuring that the "premiums" it purports to offer will never actually be paid. Pet. App. 10a. Thus, "the maximum gain to a

consumer for the hassle of arbitrating a $30.22 dispute is still just $30.22." *Id.*[1]

The agreement thus allows AT&T to negate the incentives that consumers who suspect systemic fraud or deceptive practices might have to investigate, determine whether they have a legal claim, and prosecute that claim. It also effectively eliminates any incentive a lawyer might have to represent such consumers. In the district court, other than routine billing disputes, AT&T could not identify "any claims ... for deceptive advertising" or "other alleged wrongdoing" that had ever been resolved under its "consumer friendly" agreement. Pet. App. 44a.

AT&T's account of "the allegedly unique and 'pro-consumer' nature of the agreements," is belied by the numbers. *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1257 (D. Wash. 2009). As one court found, "the actual percentage of customers utilizing [the] allegedly 'pro-consumer' provisions represents an infinitesimal amount." *Id.* at 1258. The court reported that AT&T was involved in fewer than 200 consumer arbitrations—representing, at that time, roughly 0.0029 percent of AT&T's customers—over a five-year period from 2003 to 2007. *Id.* And according to the American Arbitration Association, AT&T was involved in only about 100 consumer arbitrations of any kind between 2005 and 2010.[2]

[1] The first page of AT&T's brief cites a case describing its agreement as "consumer friendly," but does not disclose that the plaintiff there—a non-English-speaker with no lawyer—was not seeking to bring a class action. The two-page minute order did not discuss the class-action ban; it merely parroted AT&T's description of its own agreement.

[2] American Arbitration Association, http://www.adr.org/si.asp?id=4702 (accessed Sept. 14, 2010).

Compared to the universe of claims that would be asserted through class actions, the numbers starkly demonstrate the claim-suppressing effect of the ban.

2. These numbers must be evaluated not only against AT&T's customer base of 90 million subscribers (Pet. Br. 4), but also in light of published data about consumer complaints and dissatisfaction with AT&T's business practices.

A recent government study identified "billing, terms of the service contract, carriers' explanation of their service at the point of sale, call quality, and customer service as key aspects of wireless phone service with which consumers have experienced problems in recent years," and estimated that 34 percent of wireless customers received "unexpected charges" and 42 percent wanted to switch carriers but did not because of anticompetitive early-termination fees.[3] According to a Federal Communications Commission (FCC) study released this May, at least "17 percent of Americans—30 million people—have experienced" "bill shock" due to large undisclosed increases in their wireless bills.[4] The FCC receives "tens of thousands of wireless consumer complaints each year," but these complaints only scratch the surface, because "most wireless consumers with problems would not com-

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[3]GAO, *FCC Needs to Improve Oversight of Wireless Phone Service*, GAO-10-34 (Nov. 2009), *available at* http://www.gao.gov/new.items/d1034.pdf (hereinafter "*Wireless Phone Service*").

[4]*FCC Survey Confirms Consumers Experience Mobile Bill Shock and Confusion About Early Termination Fees*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC298415A1.pdf; FCC, *Americans' perspectives on early termination fees and bill shock*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC298414A1.pdf.

plain to the FCC and many do not know where they could complain."[5]

According to the Better Business Bureau, the wireless industry generates more consumer complaints than any other industry.[6] And by several leading measures, AT&T has the worst customer-satisfaction rating in the industry.[7]

Public enforcement is minimal. "According to the FCC, the agency does not regulate issues such as carriers' contract terms or call quality."[8] It "has few rules that specifically address services consumers receive from wireless phone carriers," conducts little monitoring of consumer complaints, and does not enforce its billing rules for wireless carriers.[9] Meanwhile, States' ability to regulate wireless service has been hampered by lack of clarity about the scope of federal preemption.[10]

3. Vincent and Liza Concepcion brought this lawsuit in 2006, alleging that AT&T had violated state consumer-

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[5] GAO, *Wireless Phone Service*, at 15 (reporting a total of 127,072 consumer complaints between 2004 and 2008).

[6] Mary Pilon, *Cellphone Industry Sparks the Most Complaints*, Wall Street Journal, March 8, 2010, *available at* http://blogs.wsj.com/digits/2010/03/08/cellphone-industry-sparks-the-most-complaints/

[7] *See* American Customer Satisfaction Index, 2010 http://www.theacsi.org/ (AT&T Mobility ranked worst of all six major wireless providers) (last visited Sept. 20, 2010); Consumers Union, *Cell-Phone service ratings*, Consumer Reports (Jan. 2010) (AT&T Mobility ranked last in wireless customer satisfaction in nationwide consumer survey).

[8] GAO, *Wireless Phone Service*, at 22

[9] *Id.* at 15-25.

[10] *Id.* at 33-36.

protection laws by advertising wireless phones as "free" without disclosing a $30.22 fee that appeared on their bill. Pet. App. 19a.[11] The Concepcions first purchased their phone service from AT&T in 2002. When they filed suit, their service agreement included AT&T's then-standard arbitration clause, including the class-action ban. *Id.* 19a-20a. Invoking a "change-in-terms" clause, AT&T has repeatedly modified the agreement, but the class-action ban has remained in place each time.[12]

Nine months after the Concepcions filed suit, AT&T again unilaterally modified the agreement through a notice accompanying their monthly bill. *Id.* 20a. The notice included the supposedly "consumer-friendly" provisions under which AT&T would pay attorneys' fees plus a "premium" (the maximum claim that could be brought in small claims court) if an arbitrator issued an award to a consumer exceeding AT&T's last written settlement offer before selection of the arbitrator. *Id.* 21-22a. The record does not show whether the Concepcions actually received that notice. In March 2008, AT&T moved to compel arbitration, and the Concepcions opposed.

The district court followed the California Supreme Court's decision in *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005), which concluded that some class-action bans are unconscionable under

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[11] AT&T attributes the charge to sales tax, but California law allows merchants to pass the cost of sales tax onto consumers only with their consent, *Livingston Rock & Gravel Co., Inc. v. DeSalvo*, 136 Cal. App. 2d 156, 160-61 (Cal. Ct. App. 1955), and AT&T's advertising did not disclose that consumers would have to pay sales tax on the "free" phones.

[12] *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. Rev. 605, 654-56, 659-60 (2010) (describing history of AT&T's strategic revisions).

California law. The court adhered to an earlier order in which it had found class-action bans unconscionable in a similar case against other wireless carriers with which the Concepcions' suit was consolidated. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1192 (S.D. Cal. 2005), *aff'd*, 252 Fed. Appx. 777 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2500 (2008).

Under California law, courts evaluate contracts for both "procedural" and "substantive" unconscionability. Procedural unconscionability "generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Discover Bank*, 113 P.3d at 1108. Substantively unconscionable agreements "may take various forms, but may generally be described as unfairly one-sided," including those that "operate effectively as exculpatory clauses." *Id.*

The district court found AT&T's class-action ban both procedurally and substantively unconscionable. The court agreed with the plaintiffs that the ban would exculpate AT&T from alleged wrongful conduct because, "especially as to deceptive practices, many plaintiffs may not know their rights are being violated." Pet. App. 43a (alterations and emphasis omitted). Absent a class action and procedures "for notifying potential class members," many consumers would be left with "no recovery." *Id.* The court observed that AT&T "did not respond to this argument," was unable to explain how the class-action ban would not function as an exculpatory clause with respect to "thousands" of parties to the agreement "who have no knowledge of the alleged wrongdoing," and could not point to any deceptive-advertising or similar claims brought under its dispute-resolution process. Pet.

App. 44-45a. The court concluded that AT&T had "essentially granted itself a license to push the boundaries of good business practices to their furthest limits," *id.* at 46a (quoting *Discover Bank*, 113 P.3d at 1108), a concern "not sufficiently addressed" by AT&T's revised agreement. *Id.*

4. The court of appeals affirmed, concluding that "AT&T's class action waiver is in effect an exculpatory clause." Pet. App. 11a. The court also concluded that the premium-payment and fees clauses in AT&T's revised agreement would not change the outcome under *Discover Bank*. That analysis, the court explained, "focuses on whether damages are predictably small and, in the end, the premium payment provision does not transform a $30.22 case into a predictable $7,500 case." *Id.* 9a-10a. The court held that the FAA "does not expressly or impliedly preempt California law governing the unconscionability of class action waivers in consumer contracts of adhesion," *id.* 12a, because *Discover Bank* is "simply a refinement of the unconscionability analysis applicable to contracts generally in California." *Id.* 12a-13a (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)).

SUMMARY OF ARGUMENT

I. The FAA makes arbitration agreements enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. When the question is whether the FAA preempts state-law contract principles, "the text of § 2 provides the touchstone." *Perry*, 482 U.S. at 492 n.9.

A. By mandating enforcement of arbitration agreements, subject to state-law grounds that apply to "any contract," Section 2 establishes a rule of nondiscrimi-

nation toward arbitration. That rule "places arbitration agreements on an equal footing with other contracts." *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). So long as a State's contract law does not treat an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements," *Perry*, 482 U.S. at 492 n.9, the FAA's nondiscrimination standard is satisfied.

B. State-law rulings finding class-action bans unenforceable satisfy that standard because "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory ... does not specifically apply to arbitration agreements, but to contracts generally." *Discover Bank*, 113 P.3d at 1112. That courts find class-action bans unenforceable under the same circumstances in both arbitration and nonarbitration agreements alike demonstrates that the state-law principles applied are concerned with aggregation, not arbitration.

C. Although the state law at issue does not discriminate against arbitration, AT&T characterizes the decision below as applying a "rule" that applies "only to dispute-resolution agreements" (Pet. Br. 29) and therefore does not govern "any contract" within the meaning of Section 2. This argument has multiple flaws.

First, AT&T's logic has no sensible limiting principle because any application of general contract law requires application to specific circumstances. *Second*, AT&T's argument has nothing to do with discrimination against arbitration. The best reading of "any contract" is that it encompasses contract principles that apply regardless of whether the contract contains an arbitration clause. *Third*, AT&T's argument is inconsistent with this Court's cases, which treat arbitration agreements as a

species of forum-selection clause, subject to the same contract defenses. *Fourth*, AT&T's approach would preclude courts from policing the worst abuses and thereby lead to the destruction of public confidence in arbitration as a legitimate and fair means of dispute resolution.

Even AT&T shrinks from the implications of its argument, which would prevent application of state unconscionability doctrine to unfairly one-sided provisions within arbitration agreements that AT&T concedes should be unenforceable. AT&T's unwillingness to embrace the consequences of its own theories underscores why the Court should adhere to its longstanding view that so long as the State's law does not discriminate against arbitration, it is not preempted.

D. Although AT&T invokes the FAA's nondiscrimination principle, it simultaneously seeks to undermine that principle by positing a slippery slope under which rogue States could devise seemingly nondiscriminatory laws, such as a law mandating jury trials in arbitration—despite the parties' clear consent to informal procedures. Such rules would be preempted because the statute cannot be read to destroy itself by allowing States to require procedures that are fundamentally incompatible with arbitration. But AT&T's hypotheticals are a far cry from this case, and AT&T itself does not suggest that decisions finding class-action bans unconscionable under the law of twenty States fall into this hypothetical category.

II. *Discover Bank* is an eminently reasonable application of longstanding state contract-law principles to which this Court should defer. AT&T claims that the California Supreme Court "distorted" and "gerrymandered" its own law. But AT&T does not explain how its criticisms of the application of state law are relevant to the federal question before the Court, which is whether

the law *discriminates* against arbitration. Similarly, the theme that its class-action ban is "consumer friendly" runs throughout AT&T's brief, but the question whether the agreement is unconscionable on the facts is purely a question of state law. This Court should decline AT&T's invitation to federalize this "question of state law, which this Court does not sit to review." *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). In any event, the *Discover Bank* ruling is well grounded in established principles of California law.

III. Finally, AT&T, invoking the FAA's purposes of allowing parties to agree upon procedures and removing impediments to arbitration, contends that the state law at issue stands as an obstacle to the accomplishment of the purposes and objectives of Congress. But Congress does not pursue its purposes at all costs, and application of unconscionability principles to class-action bans in adhesion contracts *furthers*, not undermines, two key FAA policies identified by this Court: first, that arbitration is a matter of consent, the content and limits of which is determined by ordinary contract law, and second, that it does not operate to limit available remedies for wrongdoing. The FAA favors arbitration, not exculpation.

ARGUMENT

I. Because It Does Not Discriminate Against Arbitration, the State Contract Law Applied Below Is Not Preempted by the FAA.

The question before the Court is whether an application of state contract law falls within the FAA's savings clause, which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "In instances such as these, the text of § 2 provides the

touchstone" for determining whether state law conflicts with the FAA. *Perry*, 482 U.S. at 492 n.9. The FAA preempts state law only "to the extent that it actually conflicts with federal law." *Volt*, 489 U.S. at 477. "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* Preemption thus "turn[s] on whether state law conflicts with the text" of Section 2 or, put another way, "whether the ordinary meanings of state and federal law conflict." *Wyeth v. Levine*, 129 S. Ct. 1187, 1207 (2009) (Thomas, J., concurring in the judgment).

The savings clause expressly preserves state-law contract principles that do not discriminate against arbitration. The principles applied below do not discriminate against arbitration. As the California Supreme Court has explained, "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally." *Discover Bank*, 113 P.3d at 1112. Under the law of at least twenty states, courts have reached similar conclusions with respect to class-action bans that function as exculpatory clauses—in both arbitration and nonarbitration agreements alike. *See* Appendix (listing cases). Because there is no "actual conflict" here, core principles of federalism and statutory interpretation require that the State's law prevail.

Enforcing an exculpatory clause because it is part of an arbitration agreement would not make arbitration agreements "as enforceable as other contracts," but "more so." *Prima Paint*, 388 U.S. at 404 n.12. And concluding that applications of general contract principles are preempted if they can be characterized as "applicable only to dispute resolution agreements," as AT&T

contends (at 29), would make unlawful terms enforceable whenever they are laundered through an arbitration agreement. That approach would encourage the very worst abuses and thereby undermine the viability of, and public confidence in, arbitration as a legitimate method of dispute resolution.

A. The FAA's Text Preserves an Essential Role For State Contract Law That Does Not Discriminate Against Arbitration.

1. Section 2, the FAA's "centerpiece provision," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), makes written agreements to arbitrate "valid, irrevocable, and enforceable," subject to the savings clause. 9 U.S.C. § 2. By making arbitration agreements "valid, irrevocable, and enforceable," Section 2 overturns the hostility to arbitration enshrined in the ancient "ouster" doctrine, under which "courts traditionally viewed arbitration clauses as unworthy attempts to 'oust' them of jurisdiction" and "refused to order specific enforcement of agreements to arbitrate." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009).

The first clause, in isolation, might require the enforcement of *all* arbitration agreements—no matter how unfair or exculpatory the terms, and even absent bargained-for exchange or true assent. Although AT&T suggests precisely such a policy (at 23-26, 48-57), a statute like that would quickly bring arbitration into disrepute, transforming it from a method of alternative dispute resolution into a tool for stronger parties to exempt themselves entirely from the law.

To avoid that consequence, Section 2's savings clause conditions the enforceability of arbitration agreements on "grounds" available "at law or in equity" for challeng-

ing "any contract." The clause preserves an essential role for state common law, making arbitration agreements subject to contract-law defenses otherwise available at law or in equity.

Taken together, the two clauses of Section 2 establish an "enforceability mandate," under which "State law is ... applicable to determine which contracts are binding under Section 2." *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009). The FAA's provisions do not "purport to alter background principles of state contract law" and "[i]ndeed § 2 explicitly retains an external body of law governing revocation (such grounds 'as exist at law or in equity')." *Id.* State-law contract defenses that would be available absent the FAA's enactment remain available, so long as they do not run afoul of the Act's text or structure.

Under Section 2, "States may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce*, 513 U.S. at 281. "Like other contracts," arbitration agreements "may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Rent-A-Center*, 130 S. Ct. at 2776 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Because "§ 2 gives States a method of protecting consumers" against unwanted or unfair terms, *Allied-Bruce*, 513 U.S. at 281, state law is integral to upholding two foundational principles under the FAA—that arbitration is a matter of consent, not coercion, and that it represents an alternative forum, but does not exempt the drafter from the law.

2. Just as integral to the FAA is its nondiscrimination principle. Section 2 "places arbitration agreements on an equal footing with other contracts." *Rent-A-Center*, 130 S. Ct. at 2776. By preserving only defenses that apply to

"any contract," "Congress precluded States from singling out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687. In this way, the text of Section 2 establishes a core antidiscrimination principle, ensuring that arbitration agreements are not deemed unenforceable *because* they are arbitration agreements.

Applying that antidiscrimination principle, this Court has held that the FAA preempts state statutes that "mak[e] written, predispute arbitration agreements invalid" *Allied-Bruce*, 513 U.S. at 269, provide that a "contract may not be subject to arbitration" absent conspicuous notice of the arbitration clause on the first page, *Casarotto*, 517 U.S. at 681, and exempt wage-and-hour claims from "any private agreement to arbitrate," *Perry*, 482 U.S. at 484. Those statutes unquestionably discriminated against arbitration. The Court has held that the FAA preempts statutes requiring that disputes parties have agreed to arbitrate nevertheless be referred to a judicial or administrative forum, *Southland v. Keating*, 465 U.S. 1, 5 (1984); *Preston v. Ferrer*, 552 U.S. 346, 358 (2008), because such statutes likewise conflict with Section 2's enforceability mandate.

In a much-quoted footnote in *Perry*, the Court distilled the relevant antidiscrimination framework:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in

> which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

482 U.S. at 492 n.9 (emphasis in original).

The preemption inquiry, then, turns on whether the state law in question *discriminates* against arbitration. So long as a State does not "singl[e] out arbitration provisions for suspect status," *Casarotto*, 517 U.S. at 687, treat an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements," or "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding," *Perry*, 482 U.S. at 492 n.9, the FAA's nondiscrimination standard is satisfied.

B. The States That Have Found Class-Action Bans Unenforceable Have Not Discriminated Against Arbitration.

AT&T acknowledges that the preemption question in this case must be answered by the FAA's "fundamental antidiscrimination principle." Br. 28. But although AT&T's brief repeatedly describes California's approach to class-action bans as only "nominally" or "ostensibly" nondiscriminatory (suggesting that the reality is otherwise), it never explains how the State's law has *actually* discriminated against arbitration. Br. 17, 28, 30.[13]

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[13] Although employing the rhetoric of discrimination, AT&T appears to advocate a shift from the FAA's *disparate treatment* regime (which turns on whether the State treats arbitration "in a

(*Footnote continued*)

Although class-action bans have been held unenforceable under the common law of twenty States, not a single state or federal appellate court has concluded that the FAA preempts such determinations. That is because these determinations, including the California Supreme Court's *Discover Bank* decision, easily satisfy the nondiscrimination test: The state does not treat arbitration agreements "in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry*, 482 U.S. at 492 n.9.

1. In California, and under the common law generally, "unconscionability is a doctrine fundamental to the operation of contract law, irrespective of the particular application." *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 123 n.12 (Cal. Ct. App. 1982). Indeed, California law "codifies the unconscionability doctrine in Civil Code section 1670.5, *applicable to all types of contracts*, rather than as part of the Commercial Code." *Id.* (emphasis added); *see Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 175 (Cal. 1981) (describing unconscionability as a "principle of equity applicable to all contracts generally"). Section 1670.5 (which mirrors U.C.C. § 2-302) authorizes courts to "refuse to enforce" any contract found "to have been unconscionable at the time it was made" or sever or "limit the application of any unconscionable

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manner different from that in which it otherwise construes nonarbitration agreements," *Perry*, 482 U.S. at 492 n.9), to a *disparate impact* regime: "[E]ven if nominally neutral," AT&T argues, *Discover Bank* "predictably and inevitably will have a far greater *impact* on arbitration agreements" than on nonarbitration agreements. Pet. Br. 30 (emphasis added). But none of this Court's decisions suggests that neutral state laws are preempted simply because potential defendants often choose to combine otherwise unenforceable provisions with arbitration agreements.

clause so as to avoid any unconscionable result." Cal. Code. Civ. § 1670.5.

California's unconscionability doctrine incorporates the venerable prohibition on exculpatory clauses, which was recognized in "the common law of England and America before the declaration of independence." *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 412 (1889); *see Restatement (Second) of Contracts* § 195 ("[A] party's attempt to exempt himself from liability for negligent conduct may fail as unconscionable."). That rule, applicable to "all contracts" and codified in California's law since 1872, renders unenforceable "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud." Cal. Civ. Code § 1668.

Considering the enforceability of a class-action ban in a standard credit-card agreement, *Discover Bank* applied California's generally applicable contract law to conclude that "at least some class action waivers in consumer contracts are unconscionable under California law." 113 P.3d at 1108. The court found "an element of procedural unconscionability" because the credit-card agreement was a contract of adhesion that had been sent to the consumer as a "bill stuffer." *Id.* Turning to substantive unconscionability, the court found that class-action bans "may operate effectively as exculpatory contract clauses" because, when many consumers are exposed to the same fraudulent practice by the same seller, "the class action is often the only effective way to halt and redress such exploitation." *Id.* at 1108-09. Even for consumers who are aware of the fraud, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* at 1105 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,

617 (1997)). Class actions are thus "inextricably linked to the vindication of substantive rights," and class-action bans, "at least to the extent they operate to insulate a party from liability that would be imposed under California law, are generally unconscionable." *Id.* at 1109.

Discover Bank did "not hold that all class action waivers are necessarily unconscionable." *Id.* at 1110. "But when the waiver is found in a consumer contract of adhesion in a setting in which the disputes between the contracting parties predictably involve small amounts of damages," and it is alleged "that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," the waiver is effectively an "exemption of the party 'from responsibility for its own fraud, or willful injury to the person or property of another,'" *id.* (quoting Cal. Civ. Code § 1668), and "unconscionable under California law." *Id.*

Thus, contrary to AT&T's suggestion, *Discover Bank* did not erect a per se rule; rather, state law calls for a fact-specific inquiry into any contract term that would potentially exculpate one party. Under *Discover Bank*, California courts assess enforceability case by case and decline to enforce a class-action ban only where it would lead to an "unconscionable result." Cal. Code. Civ. § 1670.5. Several recent decisions applying California law have *rejected* unconscionability challenges to class-action bans in circumstances where they would not be exculpatory.[14] Other states follow the same even-handed ap-

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[14] *See, e.g., Arguelles-Romero v. Superior Court (Americredit Fin. Servs., Inc.)*, 109 Cal. Rptr. 3d 289, 305-07 (Cal. Ct. App. 2010); *Gold v. Melt*, 2010 WL 1509795, at *7-78 (Cal. Ct. App. 2010); *Walnut Producers of Calif. v. Diamond Foods, Inc.*, 114 Cal. Rptr. 3d

(*Footnote continued*)

proach. For example, the New Jersey Supreme Court issued two decisions the same day—one enforcing a class-action ban in a case where the plaintiff sought over $100,000 in damages, *Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006), and one invalidating a class-action ban where each consumer's maximum recovery was $600, *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 99 (N.J. 2006).

2. Class-action bans are not limited to arbitration agreements. The approach courts have taken to class-action bans in nonarbitration agreements, both before and after *Discover Bank*, demonstrates that the California Supreme Court and other courts that have reached the same conclusion are concerned with aggregation, not arbitration. That is, they are concerned with the enforceability of contracts that purport to cut off the right to bring classwide proceedings *without regard to forum*. Although the contract in *Discover Bank* included an arbitration clause, the starting point for the court's unconscionability analysis was a California appellate case decided four years earlier, concerning "the validity of a contractual class action waiver *outside the arbitration context*." *Discover Bank*, 113 P.3d at 158 (emphasis added) (citing *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal Ct. App. 2001) ("*AOL*").

In *AOL*, former subscribers brought a class action alleging that the online service violated state law by debit-

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449, 460-62 (Cal. Ct. App. 2010); *Citibank (South Dakota), N.A. v. Walker*, 2008 WL 4175125, at *4 (Cal. Ct. App. 2008); *Smith v. Americredit Fin. Servs., Inc.*, 2009 WL 4895280, at *6-*8 (S.D. Cal. 2009); *Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1027 (E.D. Cal. 2009); *McCabe v. Dell, Inc.*, 2007 WL 1434972, at *3–*4 (C.D. Cal. 2007); *Torres v. Chrysler Fin. Co.*, 2007 WL 3165665, at *2-*3 (N.D. Cal. 2007).

ing their credit cards for small monthly fees even after their subscriptions were canceled. The company invoked Virginia forum-selection and choice-of-law clauses in its subscription agreement. Because Virginia does not permit consumer class actions, the court concluded, the provisions were the "functional equivalent of a contractual waiver" of the right to bring a class action. *Id.* at 699. The court held that, as applied to the small claims before it, the denial of classwide remedies would "substantially diminish the rights of California residents." *Id.* at 708. *AOL* emphasized several practical justifications for aggregated proceedings, including the "protection of unwary consumers from being duped by unscrupulous sellers" and the impracticability of individual actions where "the amount of individual recovery would be insufficient to justify bringing a separate action," allowing an "unscrupulous seller [to] retain[] the benefits of its wrongful conduct." *Id.* at 712. The court stressed the "salutary" effects of class actions that would be lost if the bans were permitted in such a case, including deterrence and "curtailing illegitimate competition." *Id.*[15]

AOL is not an isolated decision. The Washington Supreme Court held the same forum-selection clause unenforceable in a nonarbitration agreement because it effectively barred class actions, *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007), on the same day that it issued a

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[15] *AOL* relied in part on an antiwaiver provision in the Consumer Legal Remedies Act, Cal. Civ. Code § 1751, but independently rested on a broader analysis of the effect on consumers' substantive rights. *AOL*, 108 Cal. Rptr. 2d at 711-14 ("The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement."). *Discover Bank* expressly disclaimed reliance on the statutory antiwaiver portion of *AOL*'s analysis. *See Discover Bank*, 113 P.3d at 1108.

decision striking down a class-action ban in an arbitration clause, *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007). In cases having nothing to do with arbitration, courts in Florida and Massachusetts have also held that same provision unenforceable to the extent that it functions as an exculpatory class-action ban.[16]

Courts in California have likewise applied both *Discover Bank* and Section 1668 (the prohibition on exculpatory clauses) in cases involving express class-action bans in *nonarbitration* agreements. *See, e.g., In re Yahoo! Litig.*, 251 F.R.D. 459 (C.D. Cal. 2008); *Elhilu v. Quiznos Franchise Co., LLC*, No. 06-CV-07855, Doc. 69 at 8 (C.D. Cal. April 3, 2008). The language of such express class-action bans is no different from class-action bans found in arbitration agreements. *See In re Yahoo!*, 251 F.R.D. at 463 ("Any claim against Overture arising from this Agreement shall be adjudicated on an individual basis, and shall not be consolidated in any proceeding with any claim or controversy of any other party."); *Martrano v. The Quizno's Franchise Co., LLC*, 2009 WL 1704469 (W.D. Pa. 2009) ("The parties agree that any proceeding will be conducted on an individual, not a class-wide, basis, and that any proceeding ... may not be consolidated.").

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[16] *America Online, Inc. v. Pasicka*, 870 So.2d 170, 171-72 (Fla. Ct. App. 2004) (agreement unenforceable because consumer law "does not exist solely for the benefit of the individual parties, and is instead designed to afford a broader protection to the citizens of Florida"); *Williams v. America Online*, 2001 WL 135825, at *3 (Mass. Super. Ct. 2001) (holding clause unenforceable where "plaintiffs seek to represent a class of Massachusetts residents, ... Massachusetts consumers who individually have damages of only a few hundred dollars"); *see also Doe 1 v. AOL LLC*, 552 F.3d 1077 (9th Cir. 2009) (following *AOL v. Superior Court*).

The approach taken by California and other states is thus both facially nondiscriminatory toward arbitration and nondiscriminatory in purpose and effect. As the Washington Supreme Court put it, "[t]he arbitration clause is irrelevant to the unconscionability." *Scott*, 161 P.3d at 1008. Exculpatory clauses "do not change their character merely because they are found within a clause labeled 'Arbitration.'" *Id.*

C. AT&T's Construction of the Phrase "Any Contract" Is Incoherent and Would Threaten the Viability of, and Public Confidence In, Arbitration As a Legitimate Means of Dispute Resolution.

Although California unconscionability law does not treat arbitration agreements differently from nonarbitration agreements, AT&T characterizes the decision below as applying a rule "applicable only to dispute-resolution agreements." Pet. Br. 29. Based on that characterization, AT&T argues that this "rule" does not govern "contracts generally" and therefore does not fall within Section 2's savings clause. This kind of logic has no sensible limiting principle. Because any application of general contract law to a particular contract or type of contract could be so characterized, the argument is both incoherent and unworkable.

1. AT&T effectively asserts that general principles of contract law, such as unconscionability, are no longer general principles when applied to an arbitration agreement. Instead, they are transformed into rules specific to "dispute resolution agreements." But the same could be said of any application of unconscionability (or any other contract-law defense) to specific facts or circumstances. AT&T's logic would render the FAA's savings clause a nullity. The argument misconceives the nature of com-

mon-law doctrines, which by necessity are continually applied and refined "as new circumstances and fact patterns present themselves." *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001); *see Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90 (1955) ("This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships."). Under AT&T's reasoning, the rule this Court applied in *Bisso* (the prohibition against exculpatory clauses) governed only "towage contracts" and was not a rule of general applicability.

Under that logic, the preemption of state law depends not on discrimination against arbitration, but on the level of generality with which one chooses to characterize the state-law "rule." AT&T's argument proves too much: On its view, the FAA would preempt the Uniform Commercial Code, including its codification of unconscionability and other general defenses, because most of its provisions govern only specific categories of contracts, such as sales-of-goods agreements or bills of lading. This would come as news to judges, lawyers, and businesses that have long relied on the U.C.C. as part of the general contract law applicable to arbitration agreements. Many general sections of the Restatement would also be preempted. *See, e.g., Restatement (Second) of Contracts* § 211(3) (concerning "standardized contracts," rather than all contracts); *id.* § 15 (contracts made by mentally disabled persons). It is not difficult to devise more absurd examples: By AT&T's reasoning, if a state supreme court applying unconscionability law were to determine that contracts providing for payment of a penalty of a pound of flesh from a debtor were unconscionable, and lower courts in that state applied the precedent to other pound-of-flesh contracts, the rule

would not be applicable to "any contract" but only to pound-of-flesh agreements, and hence would be preempted if applied to an arbitration clause containing such a penalty.

2. Even apart from its incoherence and malleability, AT&T's construction of "any contract" has nothing to do with discrimination against arbitration. The better, more natural, reading of the phrase is that it encompasses "grounds" that "exist at law or in equity for the revocation" of a contract, *regardless of whether the contract contains an arbitration clause*. That reading is consistent with the nondiscrimination or "equal footing" principle articulated in all of this Court's previous FAA preemption cases, under which arbitration agreements are to be treated like other contracts that are similarly situated but for their lack of an arbitration clause. Thus, if a provision of the U.C.C. is applicable only to contracts for sales of goods, the FAA's "equal footing" principle does not require that sales contracts be exempted from that provision because they contain an arbitration agreement. To conclude otherwise would be to make sales contracts containing arbitration agreements more enforceable than otherwise identical sales contracts.

AT&T pays lip service to the principle that arbitration agreements must be placed on an "equal footing" with other contracts. But ultimately, by seeking to exempt them from defenses applicable to other contracts, AT&T asks this Court to treat them as, in Orwell's phrase, "more equal than others." George Orwell, *Animal Farm* 123 ("All animals are equal. But some animals are more equal than others").

3. AT&T's interpretation of the phrase "any contract" also cannot be reconciled with this Court's cases. This Court has explained many times that an arbitration

clause is merely a "species" or "subset" of forum-selection clause. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 533, 534 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *see also Allied-Bruce*, 513 U.S. at 289 (Thomas, J., dissenting).

Although the law generally favors enforcement of forum-selection clauses, the Court has held that such agreements "should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). And the Court has said that courts should police forum clauses in form contracts for unfairness where the parties lack equal bargaining power. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) ("Forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.").

Under AT&T's reasoning, these principles would fall outside Section 2's savings clause because they apply only to forum-selection agreements or "dispute resolution contracts." But in *Vimar*, this Court endorsed precisely the opposite logic: "[A]s foreign arbitration clauses are but a subset of foreign forum selection clauses in general," a rule governing forum-selection had "been extended to arbitration clauses as well." 515 U.S. at 534. The Court characterized "the logic of that extension" as "quite defensible." *Id.* More important, in *Vimar* and, ten years earlier, in *Mitsbushi*, the Court explained that if a foreign arbitration agreement "operated ... as a prospective waiver of a party's right to pursue statutory remedies ... we would have little hesitation in condemning the agreement as against public policy." *Vimar*, 515 U.S. at 540 (citing exculpatory-clause cases); *Mitsubishi*,

473 U.S. at 637 n.19 (citing 15 Williston, Contracts §1750A (3d ed. 1972) (section on exculpatory clauses)).

Just as in *Vimar*, that "the forum here is arbitration" does not mean ordinary contract-law principles applicable to forum-selection or other "dispute resolution" agreements are preempted. *See Vimar*, 515 U.S. at 538. Rather, the FAA requires enforcement of an arbitration clause only "where there is no independent basis in law or in equity for revocation." *Id.* at 534. The principle that "[f]orum selection clauses contained in form ... contracts are subject to judicial scrutiny for fundamental fairness" and may be "condemn[ed] ... as against public policy," applies equally to arbitration clauses. *Id.* at 541 (citing *Carnival Cruise Lines*, 499 U.S. at 595).

4. AT&T's theory would also insulate most or all otherwise unenforceable procedural limitations in arbitration clauses from challenge under state law, no matter how egregiously one-sided or exculpatory. Section 2's savings clause would cease to serve its function of "giv[ing] States a method of protecting consumers" against unwanted or unfair terms. *Allied-Bruce*, 513 U.S. at 281. Drafters of adhesion contracts would be free to include not only class-action bans, but also a range of other one-sided and unfair procedural limitations that would ultimately reduce public confidence in arbitration itself.

For example, courts have applied the unconscionability doctrine to invalidate:

- Procedures that allow the contract's drafter or those with close ties to the drafter to select the arbitrator.[17]
- Procedures that give the drafter sole authority to select the pool of eligible arbitrators.[18]
- One-sided limitations on discovery, such as where the defendant can engage in discovery but the plaintiff cannot.[19]
- Unfair terms relating to the allocation of costs of arbitration.[20]
- Limits on the type or amount of relief the arbitrator may award, such as bans on punitive damages or injunctions.[21]
- Provisions requiring arbitration in an unreasonably distant forum.[22]

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[17] *E.g., State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Okla. Ct. App. 1993).

[18] *E.g., McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004); *Murray v. United Commercial Food Workers Int'l Union*, 289 F.3d 297, 303 (4th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 947-48 (N.D. Ind. 2000).

[19] *E.g., Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786-87 (9th Cir. 2002).

[20] *E.g., McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273–74 (Pa. Super. Ct.), *review denied*, 853 A.2d 362 (Pa. 2004).

[21] *E.g., Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 670–71 (S.C. 2007); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 277–80 (W. Va. 2002); *see generally* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003).

[22] *E.g., Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1287–92

(*Footnote continued*)

AT&T itself has acknowledged in this Court that state-law unconscionability jurisprudence appropriately weeds out many of the worst abuses embedded in arbitration clauses—terms that "plainly favor[] the business that drafted them"—such as "a requirement that the consumer pay significant arbitration fees; preclusion of important remedies, such as punitive damages or the right to recover attorneys' fees under applicable fee-shifting statutes; a confidentiality requirement; a provision that allowed the drafter the option of bringing specified claims in court rather than only in arbitration; or a requirement that arbitration take place in an inconvenient location." Amicus Br. of AT&T Mobility in Support of Neither Party, at 4, 7, *T-Mobile v. Laster*, No. 07-976 (May 27, 2008).

Ultimately, AT&T fails to offer the Court a coherent construction of Section 2 that can save arbitration from being overwhelmed by such abuses and thereby ensure public confidence in arbitration as a means of alternative dispute resolution. Instead, AT&T takes two irreconcilable positions.

On the one hand, AT&T argues that state-law rules that can be characterized as governing only "dispute resolution contracts" (at 29-30) or "procedures" (at 49-52) are categorically preempted. Under that reasoning, each of the applications of unconscionability doctrine to abusive provisions in arbitration agreements discussed above—including those applications that AT&T has specifically endorsed—would be preempted.

(9th Cir. 2006) (en banc); *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1243–46 (Mont. 1998).

On the other hand, AT&T (1) concedes that the FAA would not preempt "a general standard" requiring that the procedures imposed by an arbitration agreement "ensure that claims feasibly can be vindicated," and (2) appears to acknowledge that the FAA does not "categorically preclude[]" states from denying enforcement of class action bans under generally applicable contract law.[23] Both of these concessions contradict AT&T's theory that rules applicable to "dispute resolution agreements" and arbitration "procedure" are categorically preempted.

We do not attempt to resolve this intramural dispute between AT&T and itself. Suffice it to say that both positions cannot be correct. In any event, the state law applied in this case *is* a "general standard" designed to ensure that claims can be vindicated. And application of that general standard is an issue of state, not federal, law. As we explain in Part III below, this Court should decline AT&T's invitation to federalize this "question of state law, which this Court does not sit to review." *Volt*, 489 U.S. at 474.

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[23] To be precise, AT&T says: "This is not to say that the FAA precludes States from imposing a general standard—such as a requirement that the parties' chosen procedures ensure that claims feasibly can be vindicated" (Pet. Br. 49 n.16), and "[i]t is *not* our position that the FAA categorically preempts state unconscionability law or categorically precludes States from refusing to enforce provisions requiring bilateral arbitration when other features of those provisions make it unrealistic to vindicate claims on an individual basis." Pet. Cert. Reply 7-8 (emphasis in original).

D. State Laws Aimed At Destroying Arbitration Are Preempted By the FAA, But No Such Rule Is At Issue Here.

While purporting to rely on the FAA's "fundamental antidiscrimination principle" (at 28), AT&T simultaneously tries to undermine it. Peppered throughout AT&T's brief is a slippery-slope argument: AT&T speculates (at 50) that rogue States, "limited only by their imagination[s]," and based on a preference for litigation over arbitration, could devise seemingly nondiscriminatory rules that would, for example, require arbitrators to permit "trials by jury" or to follow "the rules of civil procedure and evidence." Pet. Br. 41, 47, 50.

These scenarios are a far cry from this case. Rules aimed at destroying arbitration, unlike the rule at issue here, *would* be preempted by the FAA—but not for the reasons that AT&T gives. Such rules would be preempted not because they would employ principles of contract law applicable only to "dispute resolution contracts" (Pet. Br. 29), or because the FAA preempts all regulation of "procedures" (Pet. Br. 49-52), or because a State adopting such rules would "distort" its own law (Pet. Br. 32-44). Rather, rules demanding procedures incompatible with arbitration would be preempted by the FAA because they cannot sensibly be reconciled with Section 2. A federal statute's savings clause "cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). Such state-law rules "directly conflict" with the federal statute. *Id.*; *see Wyeth*,

129 S.Ct. at 1209 (Thomas, J., concurring in the judgment); Nelson, *Preemption*, 86 Va. L. Rev. 225, 228-31 (2000) (outlining a "logical contradiction" test for preemption).

Accordingly, in light of the text and structure of Section 2, the "grounds" available under the savings clause should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and "would wholly eviscerate arbitration agreements." *Carter v. SSC Odin Operating Co., LLC*, 927 N.E.2d 1207, 1220 (Ill. 2010) (holding anti-jury-trial-waiver statute preempted on this basis); *cf. Southland*, 465 U.S. at 16 n.11 (FAA preempts laws by which "states could wholly eviscerate" Section 2's equal footing principle).

To take the most obvious example, a State could not enact a statute reviving the ouster doctrine. Such a statute would discriminate against arbitration. *See Southland*, 465 U.S. at 13; Cohen, *Commercial Arbitration and the Law* 153-169 (1918). But even apart from its discriminatory effect, the statute would be preempted because it would swallow the general rule of enforceability by making *all* arbitration agreements unenforceable. *Cf. Vaden*, 129 S. Ct. at 1274-75 ("To the extent that that the ancient 'ouster' doctrine continued to impede arbitration agreements, § 2 ... directly attended to the problem."). Similarly, because "[a]rbitration carries no right to trial by jury," *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956), a rule forbidding jury-trial waivers would make arbitration agreements unenforceable in violation of Section 2. *See also Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 306 (4th Cir. 2001) ("[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."). The

same analysis could apply to a law mandating that arbitrators follow the court system's rules of evidence, even when parties have chosen more flexible procedures. *See Bernhardt*, 350 US. at 203 n.4 ("Arbitrators are not bound by the rules of evidence.")

By contrast, the FAA does not preclude States from applying general contract defenses, such as unconscionability, to one-sided, exculpatory procedural limitations in adhesion contracts if the effect is not to require procedures incompatible with arbitration. For example, an agreement that allowed an employer full discovery but denied any discovery to an employee seeking to bring a discrimination claim would likely be found unconscionable. And, for the same employee, an arbitration agreement that banned *any* discovery for both parties might well "render[] arbitration of his factbound employment-discrimination claim unconscionable." *Rent-a-Center*, 130 S. Ct. at 2780. AT&T's hypotheticals (laws insisting on juries, "plenary" discovery, civil procedure rules), on the other hand, do not implicate concerns about one-sided terms or systematic exculpation. A State's law might reflect the view that "trial by jury is preferable to any other," Va. Const. art I § 11, but factfinding by an impartial arbitrator as opposed to a lay jury would not amount to exculpation. *See, e.g., Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) ("For every argument why juries are more accurate factfinders, there is another why they are less accurate.").

AT&T never claims that classwide proceedings and arbitration are fundamentally incompatible. This Court's recent decision in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), was premised on the availability of class arbitration as a potential dispute resolution mechanism that parties may adopt by contract. The

Court stated that a party may be "compelled under the FAA to submit to class arbitration" where "there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). Were these two modes of efficient dispute resolution inherently incompatible, that conclusion would make no sense. *See also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454-55 (2003) (Stevens, J., concurring) ("There is nothing in the Federal Arbitration Act that precludes" the conclusion that "class-action arbitrations are permissible."); *id.* at 459 (Rehnquist, C.J., dissenting) ("The FAA does not prohibit parties from choosing to proceed on a classwide basis.").[24]

II. States That Have Found Class-Action Bans Unenforceable Have Not Distorted Their Law.

A. This Court Should Defer to the Exposition of State Law By the States' Highest Courts.

AT&T "devotes the bulk of its argument" to "a question of state law, which this Court does not sit to review." *Volt*, 489 U.S. at 474; *see* Pet. Br. 18-21, 31-47. AT&T claims that the California Supreme Court has been unfaithful to California law, reaching a "novel" decision that "deviates from," "distort[s]," and "gerrymander[s]" the State's own law. Br. 20, 32, 47. Those claims are wrong: California, like the many other States that have reached similar conclusions, has faithfully applied longstanding common-law contract principles to the contemporary phenomenon of the class-action ban. But even if the application of California law (and, by logical extension, the

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[24]Here, class arbitration is not a possibility because AT&T prefers to defend class actions in court, reserving arbitration for individual disputes. Pet. App. 61a ("blowup" clause).

law of twenty other States) represented a departure from state-law precedent, that would have no bearing on the question before the Court, which is whether state and federal law actually conflict. As it did in *Volt*, this Court should decline to review whether the court of appeals misapplied California contract law. 489 U.S. at 474-75; *see* S. Ct. Rule 10.

Entertaining AT&T's plea would entail an unprecedented intrusion into state sovereignty, inevitably federalize state contract law, and prove unworkable in practice. This Court, and the lower federal courts, could become endlessly embroiled in assessing the fidelity of state-court decisions to state law, thereby "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275. AT&T supplies no judicially manageable standards to govern that thorny inquiry.[25]

As a matter of "comity and respect," this Court ordinarily "defer[s] to the decisions of state courts on issues of state law." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring); *id.* at 148-51 (Ginsburg, J., dissenting). And "as a rule [the Court] should be and [is] 'reluctant to federalize' matters traditionally covered by state common law," including the law of contracts. *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989); *see* Davant, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 Duke L.J. 521, 546-50 (2001)

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[25] Already, this case has encouraged a tag-along petition by another wireless carrier, alleging that the New Jersey Supreme Court has "manipulat[ed] and "distort[ed]" New Jersey law. Pet. for Cert. in *Cellco P'ship d/b/a Verizon Wireless v. Litman*, No. 10 398 at 22, 26 (filed Sept. 20, 2010).

(Section 2 "preserves an important sphere of state sovereignty").

To be sure, this Court must occasionally consider the relationship between an allegedly abrupt change in state law and preexisting precedents—for example, under the fair-warning principle of the Due Process Clause, *see Rogers*, 532 U.S. 451, or in entertaining judicial takings or Contracts Clause claims. *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Prot.*, 130 S. Ct. 2592 (2009); *Hale v. Iowa State Bd.*, 302 U.S. 95, 101 (1937); *Hart and Wechsler's The Federal Courts and the Federal System* 527-40 (5th ed. 2003). But unlike those constitutional claims, which are concerned with *changes* in state law, FAA preemption does not depend on whether state law has changed.

Even by the standards of the fair-notice and takings cases, AT&T's argument goes beyond the proper scope of this Court's review. The argument boils down to a claim that the unconscionabilty principles applied below do not really "*exist* at law or in equity," 9 U.S.C. § 2, measured against preexisting state law. But when there is "doubt about [the] existence" of a state-law principle, this Court "do[es] not make [its own] assessment but accept[s] the determination of the state court." *Stop the Beach*, 130 S. Ct. at 2607 n.9 (Scalia, J., plurality opinion); *see Rogers*, 532 U.S. at 460-62; *id.* at 468-49 (Scalia, J., dissenting) (a "reasonable reading of state law by the State's highest court is binding upon us" as to whether a rule was "truly established" by state law).

Because no perfect eighteenth- or nineteenth-century equivalent to class-action bans exists, the various decisions addressing their enforceability are in that sense necessarily "novel" in relation to the past. But there is a "crucial difference between simply applying a law to a

new set of circumstances and changing the law that has previously been applied to the very circumstances before the court," *id.* at 471, and AT&T does not even suggest that the latter sort of break in the law has occurred here.

B. California Has Been Faithful to Its Own Common Law of Contracts.

AT&T measures *Discover Bank* against a cramped understanding of the history and scope of unconscionability doctrine and concludes that it comes up short. There is nothing aberrant about *Discover Bank*. The California Supreme Court—like the many other courts that have held class-action bans unenforceable—has faithfully applied the State's own contract law.

1. Unconscionability Is Not Limited to Nineteenth-Century Standards. Unconscionability is not, as AT&T contends, limited to the nineteenth-century inquiry into whether a contract is one that "shocks the conscience" and to which "no person who is not acting under delusion would agree." Pet. Br. 32-33, 4. These descriptions "are accurate in the sense that a contract that meets either of these descriptions is surely unconscionable," but they are "underinclusive" compared to modern unconscionability doctrine. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 269 (Ill. 2006). Although unconscionability has "deep roots in both law and equity," 7 *Corbin on Contracts* § 29.2, "it is only with the advent of U.C.C. 2-302," in 1952, "that courts began in earnest to grapple with the ramifications of the unconscionability doctrine and to spell out specific content." Ayres and Speidel, *Studies in Contract Law* 562 (7th ed. 2008).

AT&T's formulation, from Justice Story's *Commentaries on the Laws of Equity*, is derived from dicta in an

1804 opinion by English Chancellor Eldon, concerning an exception to the rule that inadequate consideration was not a ground for refusing specific performance. Teeven, *A History of the Anglo-American Common Law of Contract* 316 (1990). The exception, which became widely invoked by the mid-nineteenth century, "expand[ed] the spectrum of cases short of actual fraud qualifying for relief and aided in opening juridical thought to further extensions." *Id.* In short, the "shocks the conscience" standard represents an early stage in the evolution of unconscionability doctrine—not its final state. *Id.*

2. As a Matter of California Law, AT&T's Agreement Is Not Fair to the Parties. AT&T contends that its agreement "is undeniably fair" to the Concepcions and that the unconscionability and exculpatory-clause doctrines are limited to considering "the fairness of the challenged provision to the parties to the agreement before the court." Pet. Br. 34, 43. From those premises, AT&T reasons that *Discover Bank*'s unconscionability analysis impermissibly "rests entirely" on a concern for third parties. Br. 36. AT&T is wrong at each step.

The class-action ban was not "fair to the Concepcions," as AT&T contends (at 36), nor did the lower courts so conclude. The theme that its class-action ban is "consumer friendly" runs throughout AT&T's brief, but AT&T never explains how that claim about fairness relates to the federal preemption issue before the Court, as opposed to the application of state law to the facts. Because the question whether the agreement is unconscionable or unfair implicates only questions of California law and no genuine issue under the FAA, it presents no issue for this Court to resolve. *See Volt*, 489 U.S. at 474. In any event, the California Supreme Court's decision in *Discover Bank* and the lower court decisions in

this case are eminently reasonable applications of state contract law.

First, as the court of appeals recognized, AT&T's agreement allows it to buy off small claimants like the Concepcions for the face amount of their claim, ensuring that the "premiums" and fees it purports to offer consumers will not actually be paid. Pet. App. 10a. AT&T does not claim that these illusory premiums have *ever* been paid out. Thus, "the maximum gain to a consumer for the hassle of arbitrating a $30.22 dispute is still just $30.22." Pet. App. 10a. And AT&T can effectively negate any real incentive an attorney might have to represent a consumer with such a claim. *Id.* AT&T offers no reason to believe that the Concepcions would have brought their $30.22 deceptive-advertising claim if they had been forced to do so individually, or that they could have found counsel to do so. *See Carnegie v. Household Int'l., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). For that reason, it will often "be in the interest of a class-action defendant" to "'buy off' the individual private claims of the named plaintiffs"—the rare individuals who detect fraud or discrimination and take the initiative to make a claim. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (noting that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender," "would obviously frustrate the objectives of class actions."). This is a "classic application of the strategy of divide and conquer." *Abron v. Black & Decker*, 654 F.2d 951, 973 (4th Cir. 1981).

Second, as the numbers show (*see supra* 3-5), the "infinitesimal" number of arbitrations and claims under

AT&T's clause, *Coneff*, 620 F. Supp. 2d at 1258, compared to the universe of claims that could have been brought absent the class-action ban, belies the notion that the effect of the ban is anything but exculpatory as a practical matter.

Third, AT&T's fairness argument is internally inconsistent. On the one hand, AT&T (at 37) criticizes *Discover Bank* for failing to restrict its analysis to whether the agreement was unconscionable "at the time it was made," *i.e.*, from an *ex ante* perspective.[26] On the other hand, AT&T's fairness argument depends on a purely *ex post* perspective. AT&T assesses fairness from the perspective of a perfectly informed, sophisticated consumer who has already detected fraud, knows the law has been violated, and seeks to come forward and obtain compensation. Particularly in the context of small-dollar consumer fraud, that picture describes very few people, and it would not be rational for someone to assume, *ex ante*, that he or she will fall into that category.

Fourth, the agreement was unfair to the Concepcions from an *ex ante* perspective because they were forced to give up any benefits that class actions would have *for them*—either as named plaintiffs in a class action or, more likely, as beneficiaries of the compensatory, deterrent, and cost-spreading effects of class actions brought on their behalf by others.

When the Concepcions entered into the transaction, they had no reason to believe they would be capable of

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[26] Although AT&T seeks to exclude consideration of deterrence or effects on others, that is the whole point of *ex ante* analysis: "It involves looking forward and asking what effects the decision about the case will have in the future—on parties who are entering similar situations." Farnsworth, *The Legal Analyst* 5 (2007).

monitoring and detecting AT&T's fraudulent or deceptive practices, recognizing such practices as unlawful, or hiring a lawyer to find out. "Most individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business." Hensler et al., *Class Action Dilemmas* 68 (2000). That an individual's "claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually," are among the chief justifications for the class action. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 873 (1985). The class-action mechanism "overcomes the problem that small individual recoveries may fail to provide an adequate incentive for a litigant to investigate a claim." *Muhammad*, 912 A.2d at 100 ("Without the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged."); *see Kinkel*, 857 N.E.2d at 263-76 ("The typical consumer may feel that such a charge is unfair," but, without an attorney, will not "be aware that he or she has a claim that is supported by law"); *Gentry v. Superior Court*, 165 P.3d 557, 567 (Cal. 2008) ("[I]ndividual employees may not sue because they are unaware that their legal rights have been violated.").

California courts have long refused to enforce contracts shortening statutes of limitation so as to make it unreasonably difficult, from an *ex ante* perspective, for a party to "discover their causes of action." *Moreno v. Sanchez*, 131 Cal. Rptr. 2d 684, 698 (Cal. Ct. App. 2003); *see Beeson v. Schloss*, 192 P. 292, 294 (Cal. 1920). More generally, the concern that a party may enter into a contract with an exculpatory term that is unfair in light of the party's *ex ante* lack of knowledge has been recognized in California contract law for more than a century.

See, e.g., In re Garcelon's Estate, 38 P. 414, 419 (Cal. 1894) (refusing to enforce an exculpatory clause in part because "the parties to the contract could not," *ex ante*, "have in view any particular subject-matter, or have any conception of the amount which might be involved in the causes of action upon which the covenant was to operate"); *Steven v. Fidelity & Casualty Co. of New York*, 377 P.2d 284, 298 (Cal. 1962) (condemning exclusionary clause in adhesion contract as unconscionable for placing an "unexpected burden" on consumers).

In the language of economics, detecting and investigating fraud requires individuals to incur information, monitoring, and transaction costs, which may actually exceed the individuals' net loss. *See* Hay, *Procedural Justice: Ex Ante vs. Ex Post*, 44 UCLA L. Rev. 1803, 1815-16 (1997) ("[E]ffective deterrence of undesirable behavior may require costly investments by the beneficiary of such deterrence."). Class actions spread those costs, preventing individuals from having to bear them alone. *See Roper*, 445 U.S. at 338 n.9; Posner, *Economic Analysis of the Law* § 21.11 (6th ed. 2003). Under AT&T's contract, however, a consumer is unknowingly made to incur those costs, which are normally borne by all similarly situated people and those who act as private attorneys general. *Id.* It is not reasonable to impose that burden on consumers.

As one seminal California unconscionability case explained, "a contract is largely an allocation of risks between the parties" and a "contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner." *A&M Produce*, 186 Cal. Rptr. at 125. "[N]ot all unreasonable risk reallocations are unconscionable," and reasonableness must be assessed in relation to the level of

relative bargaining power and unfair surprise. *Id. A&M Produce* held unconscionable a disclaimer of warranties on the grounds that it was "patently unreasonable to assume that a buyer would purchase a standardized mass-produced product from an industry seller without any enforceable performance standards. From a social perspective, risk is most appropriately borne by the party best able to prevent its occurrence." *Id.* (citing Holmes, *The Common Law* 117 (1881)). That same principle applies with full force to the monitoring and information costs of detecting fraud, the transaction costs of prosecuting it once it is detected, and the compensatory and deterrent effect of class actions.

3. Contract Law Has Long Been Concerned With a Contract's Effects Beyond the Two Parties. AT&T wrongly claims that the unconscionability and exculpatory-clause doctrines are blind to a contract's effects on similarly situated parties to the same form contract, or to deterrent effects benefitting society. But "the fundamental function of contract law (and recognized as such at least since Hobbes's day) is to deter people from behaving opportunistically toward their contracting parties." Posner, *Economic Analysis of Law* 94 (6th ed. 2003). And contract law recognizes that, "in many relationships, there is a situation where one person is dealing contemporaneously with several others so that a clause limiting his liability to one of them is considered to have a tendency to lead to conduct injurious to others." 8 *Williston on Contracts* § 19:27; *see also* 15 *Corbin on Contracts* § 85.1 (where "the contract's terms are such that it will have [the effect of] defrauding one or more third persons," it is an "accepted tenet of contract law that such a bargain contradicts public policy and cannot be enforced").

By the nineteenth century, American law "recognized the community-wide effect of seemingly private contracts, as between utility company and customer, insurer and insured, and railroad and farmer." Teeven, *A History of the Anglo-American Common Law of Contract* 296 (1990). This Court's cases at the turn of the twentieth century—in the context of form contracts imposed by railroads, shippers, insurers, and telegraph companies—recognized the danger of exculpatory clauses to the public. These cases rested partly on the status of the companies as "common carriers," whose role "is a public one, charg[ed] with a duty of accommodating the public in the line of his employment." *Liverpool*, 129 U.S. at 471. In one leading case, this Court found it obvious that "the public interest" was "affected by such individual contracts" and emphasized the loss in deterrence if they were enforced. *N. Y. Cent. R.R. v. Lockwood*, 84 U.S. 357, 378-79 (1873) ("The [customer] is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts."). In 1892, this Court described the parallel concerns of law and equity with the public effects of contracts: The common law would not enforce contracts that "are detrimental to the interests of the public," while equity would refuse to "aid in the enforcement of unconscionable, oppressive, or iniquitous contracts." *Pope Mfg. v. Gormully & Jeffery Mfg.*, 144 U.S. 224, 233, 236 (1892).

Like this Court, the California courts have long emphasized the public effects of unconscionable and exculpatory contracts. In *Tunkl v. Regents of the University of California*, the California Supreme Court explained that the "public interest" in a contract with an exculpatory clause is the main factor affecting its enforceability. 383 P.2d 441, 443-46 (Cal. 1963). *Tunkl* compared one early case in which an exculpatory clause had been en-

forced in a contract between a railroad and a commercial tenant, because "the interests of the public in the contract" were "more sentimental than real," *Stephens v. S. Pac. Co.*, 41 P. 783, 786 (Cal. 1895), with a decision declining to enforce an exculpatory clause in a bank's form contract. The latter decision, *Hiroshima v. Bank of Italy*, 248 P. 947, 953 (Cal. 1926), rested on a public deterrence rationale—that exculpatory clauses "induce a want of care"—and the reality that "the banking public," not merely the "particular individual," "is interested in seeing that the bank is held accountable for the ordinary and regular performance of its duties." *Id. Tunkl* established an influential test defining the "category of agreements affecting the public interest"—generally mass contracts between individuals and large businesses performing an essential service for the public. 383 P.3d at 447; *see* 8 *Williston on Contracts* § 19:22. *Tunkl*'s insights, in turn, were incorporated into the modern doctrine of unconscionability, which California codified in 1979.[27]

Other States, too, have recognized the classwide effects of exculpatory clauses in standard-form contracts in areas such as housing and employment. As one court put it, "one must ignore present day realities to say that

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[27] *Cont. Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) ("*Tunkl*'s approach essentially is rooted in the unconscionability doctrine."); *Graham*, 623 P.2d at 174 n.20 ("contracts having a demonstrable public service aspect may be deemed unconscionable"); Roos, *The Doctrine of Unconscionability: Alive and Well in California*, 9 Cal. W. L. Rev. 100, 105-06 (1972); Cava and Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 Santa Clara L. Rev. 611, 654 (1988); Reith, *Contractual Exculpation From Tort Liability in California—The "True Rule" Steps Forward*, 52 Cal. L. Rev. 350 (1964).

such an exculpatory clause ... is purely a 'personal and private affair' and 'not a matter of public interest.'" *McCutcheon v. United Homes Corp.*, 486 P.2d 1093 (Wash. 1971). Considered "realistically," an exculpatory clause in a contract is not "a purely private affair" because its "generalized use ... may have an impact upon thousands of potential tenants." *Id.*; *see also Cappaert v. Junker*, 413 So.2d 378 (Miss. 1982) (same in employment context). In short, nothing in the common law of contracts requires courts to shut their eyes to the classwide or societal impact of private contracts.

4. California Law Properly Considers the Circumstances of the Case. Finally, AT&T claims (at 37-39) that *Discover Bank* constitutes an *ex post* analysis because it instructs courts to consider the claims in the case before declining to enforce an unconscionable class-action ban. But that is a *limitation*, not an expansion, of the test. In contrast to an analysis of facial unconscionability, consideration of the circumstances determines whether enforcement will be unconscionable as applied—that is, whether it will have "any unconscionable result." Cal. Code. Civ. § 1670.5. Where a class-action ban would not operate to exculpate the defendant—because, for example, the claims involve large amounts of damages—the ban will be enforced. *See supra*, at 21 n.14. The alternative approach would have a far broader reach. *Compare Discover Bank*, 113 P.3d at 1110 (considering whether case involves "large numbers of consumers" and "individually small sums of money" before striking ban) *with Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 951 (Or. Ct. App. 2007) (striking ban without regard to circumstances). AT&T does not explain how this *limitation* on the reach of a state-law contract defense could possibly discriminate against arbitration.

III. Absent Discrimination Against Arbitration, AT&T's Broad Arguments for Purposes-and-Objectives Preemption Lack Merit.

Alternatively, AT&T argues that application of generally applicable state contract law in this case "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *Volt*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). AT&T asks the Court go beyond Section 2's text—which expressly preserves state contract-law defenses that do not discriminate against arbitration—and hold that state law is preempted even if it does not discriminate against arbitration. AT&T claims that two goals of the FAA—"allowing parties to select their own dispute-resolution procedures" and "removing impediments to arbitration"—independently preempt state law. Pet. Br. 49-56.

Despite AT&T's protestations (Pet. Br. 48 n.15), both arguments rest on "generalized notions of congressional purpose," *Wyeth*, 129 S. Ct. at 1205 (2009) (Thomas, J., concurring in the judgment), rather than the FAA's text or structure. Because the statute's text answers the preemption question, the Court should not embark on a freewheeling, extratextual attempt to divine the "purposes" or "objectives" envisioned by Congress in 1925. Such an inquiry risks undervaluing the Constitution's system of dual sovereignty, disregarding structural limitations on federal supremacy, and placing unelected federal judges in the unseemly position of choosing among "generalized notions of congressional purposes that are not contained within the text of a federal law." *Id.* at 1205; *see Arthur Andersen*, 129 S. Ct. at 1902 n.5 (describing the "federal policy favoring arbitration" as a "vague prescription" with uncertain meaning).

AT&T's arguments illustrate the "danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 678 (2003) (Thomas, J., concurring in the judgment). To be sure, the purposes AT&T cites formed part of Congress's motivation in enacting the FAA. "But no legislation pursues its purposes at all costs" and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's ... objective[s] must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). To cast aside the FAA's text and preempt state law based on a vague appeal to congressional purpose would ignore the balance struck by the FAA—between enforcing agreements and ensuring consent, and between allowing parties to select procedures and ensuring that arbitration is not used to exculpate stronger parties.

1. AT&T argues that conditioning enforcement of an arbitration agreement on the availability of particular procedures is "self-evident[ly]" incompatible with the FAA. Pet. Br. 49. As discussed in Part I.C. above, a categorical approach to preemption along the lines suggested by AT&T is not only incompatible with the FAA's text, but would risk undermining arbitration's legitimacy as a fair means of dispute resolution. The Court has never previously suggested that general contract-law defenses may not apply to limitations on procedures. Just last Term in *Rent-a-Center*, 130 S. Ct. at 2780, the Court discussed state-law unconscionability challenges involving two types of procedures—one-sided discovery limitations and a fee-splitting provision—and recognized that those challenges would be properly governed by Nevada law. *Id.*

Preston v. Ferrer, 552 U.S. 346 (2008), lends no support to AT&T's view that the FAA immunizes all otherwise unconscionable procedural limitations from state-law challenges. Neither party in *Preston* invoked Section 2's savings clause. The Court held only that the FAA preempted a statute granting an administrative agency exclusive jurisdiction over an issue that the parties had agreed to arbitrate. Here, by contrast, AT&T seeks an end run around the FAA's nondiscrimination standard for preemption of state-law defenses merely because "procedures" are at issue—an approach that has no basis in the FAA's text or this Court's cases. None of the FAA's purposes requires that result.

Indeed, application of state unconscionability law to strike down adhesion contracts with exculpatory clauses *furthers* two of the FAA's key purposes: that arbitration be consensual, and that it provide adequate remedies for wrongdoing. The purpose AT&T invokes—the "purpose of allowing parties to select their own dispute-resolution procedures" (Pet. Br. 49)—is merely one aspect of "the foundational FAA principle" that "arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 130 S. Ct. at 1773, 1775. And, as AT&T acknowledges, unconscionability is concerned with "whether enforcing the agreement is consistent with the party-autonomy principle underlying contract law." Pet. Br. 41 n.12. The doctrine is premised on the insight that terms "unreasonably favorable to the stronger party ... may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms." *Restatement (Second) of Contracts* § 208, Comment d; *see also The Kensington*, 183 U.S. 263, 268 (1902) (exculpatory clauses in form contracts "will be deemed as wanting in the element of voluntary assent"). Thus, "a determination that a contract is 'unconscionable' may in

fact be a determination that one party did not intend to agree to the terms of the contract." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O'Connor, J., concurring in judgment and dissenting in part).[28]

Applying unconscionability defenses to unfair "procedures" also furthers another key purpose of the FAA—ensuring that arbitration "only determines the choice of forum," *EEOC v. Waffle House*, 534 U.S. 279, 295 n.10 (2002), but does not "operate ... as a prospective waiver of a party's right to pursue statutory remedies." *Vimar*, 515 U.S. at 540; *cf. Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (recognizing that "the existence of large arbitration costs" may interfere with vindication of statutory rights). Because arbitration under the FAA represents only a choice of forum, the statute does not preempt the ability of the States to police their marketplaces by providing remedies for, and deterring, wrongdoing. The FAA is neutral with respect to the compensation and deterrence policies of substantive state laws, including laws aimed at consumer fraud. The FAA favors arbitration, not exculpation.

Finally, even if the FAA did generally preempt state-law regulation of "procedures," the question whether state law permits a party to enforce an exculpatory class-

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[28] Unconscionability's "intent is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between the parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion." 8 *Williston on Contracts* § 18.8; *see also* Di Matteo and Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 Fla. St. L. Rev. 1067 (2006) (empirical study demonstrating that "the notion of true assent" is "an overriding consideration in unconscionability cases").

action ban cannot be cast aside "as being merely [about] what 'procedural mode' [is] available." *Stolt-Nielsen*, 130 S. Ct. at 1776; *see also id.* at 1783 (Ginsburg, J., dissenting) ("[W]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing'—i.e., without them, potential claimants will have little, if any, incentive to seek vindication of their rights."); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) ("[M]ost procedural rules do ... affect[] a litigant's substantive rights."). As *Discover Bank* made clear, as a matter of state law, the availability of classwide proceedings is, "particularly in the consumer context, often inextricably linked to the vindication of substantive rights." 113 P.3d at 1109.

The class-action device itself arises out of fundamental principles of equity—specifically, the principle that, "to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body." *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853). In many cases, as this Court recognized more than a century ago, precluding classwide proceedings altogether "would amount to a denial of justice." *Id.*

2. AT&T also makes what it describes (at 22) as an even "broad[er]" purposes-and-objectives preemption argument, based on the FAA's "liberal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "Whatever the meaning of that vague prescription," *Arthur Andersen*, 129 S. Ct. at 1902 n.5, it cannot be invoked to strike down an application of general state-contract law that Section 2 expressly says can negate the enforceability of an arbitration agreement. That is precisely the point of the

statutory phrase "enforceable, save upon such grounds." 9 U.S.C. § 2.

a. AT&T attacks class arbitration as a "lose-lose proposition" that "no rational business will agree to." Pet. Br. 22. But some businesses *do* prefer classwide arbitration. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir. 2007) ("[W]e asked the parties whether each would prefer to be in arbitration even if the class action waiver was stricken. The company said it would prefer to be in arbitration."); *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 140 (2d Cir. 2010) (same). Businesses may decide to choose class arbitration because it combines the efficiencies of both arbitration and aggregation and is faster and potentially less costly than class-action litigation in court. *See* Amicus Br. of American Arbitration Association in *Stolt-Nielsen v. Animalfeeds*, 130 S. Ct. 1758, at 22-24 (statistics suggesting that "class arbitration proceedings ... take less time than the average class action in court"). If the decision below is affirmed, businesses will remain free to make that choice.

In any event, the complaints of AT&T and its amici are really criticisms of arbitration itself: They complain, for example, that arbitration lacks appellate review and that arbitral awards are subject to narrow review by courts. Pet. Br. 54-55. The hostility to class arbitration these arguments reflect is "a remnant of the historic mistrust of the arbitral process" that the FAA was intended to eradicate. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U. L. Rev. 301, 301 (2004); *see also Discover Bank*, 113 P.3d at 1113 (view that "arbitration is an inferior forum and therefore cannot be trusted with classwide claims" reflects "the very mis-

trust of arbitration that has been repudiated" by this Court under the FAA). The claim that large cases are too complex for arbitration is at odds with the liberal policy favoring arbitration. *See Mitsubishi*, 473 U.S. at 633 ("[T]he factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter."). To be sure, because "the relative benefits of class-action arbitration" to businesses may be "less assured" than class-action litigation in court, *Stolt-Nielsen*, 30 S. Ct. at 1775, a business may decide to forgo class arbitration in favor of litigation. But, under the FAA, that choice is up to the business drafting the agreement. *Id.*

b. AT&T predicts that allowing courts to apply general contract law defenses to class-action bans will frustrate the "liberal policy favoring arbitration" because businesses will abandon arbitration entirely rather than face classwide proceedings in arbitration. That is a false choice: Businesses can easily retain all the benefits (speed, efficiency, informality, low cost) of individual arbitration, whether they choose to resolve classwide proceedings in arbitration or in court. California law is neutral as to whether classwide proceedings take place in arbitration or in court—the answer depends on the parties' agreement. *See Stolt-Nielsen*, 130 S. Ct. at 1775-76; *Fensterstock*, 611 F.3d at 140-41.

In this case, proceeding via litigation rather than arbitration once the class-action ban was deemed unenforceable was AT&T's choice. *See* Pet. App. 61a ("blowup clause"). AT&T, not California law, determined that if it could not enforce its class-action ban, it would prefer to proceed in court. AT&T and businesses like it are free to impose that decision on their customers if they prefer, even while continuing to arbitrate the vast range of

claims by consumers and employees—individual consumer billing issues, wrongful termination claims by employees—that may be suitable for arbitration on an individual rather than a classwide basis.

The securities industry has followed precisely that approach for the past 18 years—requiring individual arbitration for most disputes, but leaving classwide proceedings to court rather than arbitration.[29] The securities industry's experience shows that the status quo works: The regime established under the law of California and many other states—under which individual arbitration remains available for the types of claims in which it can provide an appropriate consensual remedy, and class proceedings in court or arbitration are available for claims where necessary to prevent the exculpation of defendants from wrongdoing—is in fact fully compatible with a healthy system of arbitration.

CONCLUSION

The decision below should be affirmed.

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[29] Securities industry rules preclude enforcement of an arbitration agreement "against a member of a certified or putative class action," until class certification is denied, the class is decertified, or the claimant is excluded or withdraws from the class. FINRA Code of Arbitration Procedure § 12204(d), *available* at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4110 (last visited September 21, 2010); *see* Constitution of the New York Stock Exchange, Article IX, Section 2, Rule 600 (same).

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APPENDIX

Decisions Holding That Class-Action Bans May Be Found Unenforceable Under General Principles of State Contract Law

State Law	Decisions
Alabama	*Leonard v. Terminix, Co., L.P.*, 854 So. 2d 529, 538-39 (Ala. 2002)
Arizona	*Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1279-80 (D. Ariz. 2007)
California	*Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2008); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005); *America Online Inc. v. Superior Court (Mendoza)*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001)
Delaware	*Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1371-72 (S.D. Fla. 2009) (applying Delaware law)
Florida	*S.D.S Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 610 (Fla. Ct. App. 2007); *America Online, Inc. v. Pasieka*, 870 So. 2d 170 (Fla. Ct. App. 2004); *Bellsouth Mobility LLC v. Christopher*, 819 So. 2d 171, 173 (Fla. Ct. App. 2002); *Powertel v. Bexley*, 743 So. 2d 570, 576 (Fla. Ct. App. 1999); *Reuter v. Davis*, 2006 WL 3743016 (Fla. Cir. Ct. 2006)
Georgia	*Dale v. Comcast Corp.*, 498 F.3d 1216,

	1224 (11th Cir. 2007); *Gordon v. Branch Banking and Trust Co.*, 666 F. Supp. 2d 1347, 1351-52 (N.D. Ga. 2009)
Illinois	*Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006)
Massachusetts	*Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009); *Skirchack v. Dynamics Research Corp.*, 508 F.3d 49, 59-60 (1st Cir. 2007)
Michigan	*Wong v. T-Mobile USA, Inc.*, 2006 WL 2042512 (E.D. Mich. 2006); *Lazado v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000)
Missouri	*Brewer v. Missouri Title Loans, Inc.*, --- S.W.3d ---, 2010 WL 3430411 (Mo. 2010); *Ruhl v. Lee's Summit Honda*, --- S.W.3d ----, 2010 WL 3441256 (Mo. 2010); *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. Ct. App. 2008); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308-10 (Mo. Ct. App. 2005)
New Jersey	*Muhammad v. County Bank of Rehoboth*, 912 A.2d 88, 100 (N.J. 2006); *Homa v. American Express Co.*, 558 F.3d 225, 234 (3d Cir. 2009)
New Mexico	*Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008)

North Carolina	*Tillman v. Commercial Credit Loans, Inc.*, 655 S.E. 2d 362, 373 (N.C. 2008)
Ohio	*Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1183 (Ohio Ct. App. 2004)
Oregon	*Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 950-51 (Or. Ct. App. 2007)
Pennsylvania	*Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006)
South Carolina	*Herron v. Century BMW*, 2010 WL 1541297 (S.C. 2010)
Washington	*Scott v. Cingular Wireless*, 161 P.3d 1000, 1006-08 (Wash. 2007); *McKee v. AT&T Corp.*, 191 P.3d 845, 858 (Wash. 2008); *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007)
West Virginia	*State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 282-83 (W. Va. 2002)
Wisconsin	*Coady v. Cross-County Bank*, 729 N.W.2d 732, 748 (Wis. Ct. App. 2007), *review denied*, 737 S.W.3d 432 (Wis. 2007)

REPLY BRIEF

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AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

Respondents contend that our interpretation of the FAA would "insulate" from challenge under state law an arbitration clause's "egregiously one-sided or exculpatory" procedural rules (Resp. Br. ("RB") 28) and mandate enforcement of every agreement that requires bilateral arbitration and precludes class actions (*id.* at 31).

To the contrary, under our interpretation, courts could invalidate arbitration agreements that select procedures that are so egregiously unfair as to run afoul of generally applicable state-law unconscionability doctrine. And courts also could invalidate agreements requiring bilateral arbitration upon finding that a customer is unable to vindicate her rights on an individual basis.

That is *not* what happened here, however. Rather, the California courts manufactured a new legal principle—wholly inconsistent with the unconscionability analysis applied outside the arbitration context—to invalidate an arbitration clause under which respondents undeniably *can* vindicate their claims on an individual basis. The FAA prohibits that result.

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[1] The Rule 29.6 Statement in the opening brief remains accurate.

A. The *Discover Bank* Rule Is Not A Ground For The Revocation Of Any Contract.

1. The *Discover Bank* rule is not saved from preemption merely because it also applies to other dispute-resolution agreements.

Respondents assert that Section 2 does no more than "establish[] a rule of nondiscrimination toward arbitration" and that this standard is satisfied here because the *Discover Bank* rule applies to "arbitration and nonarbitration agreements alike." RB9-10.

To be sure, this Court has held that state-law rules that single out arbitration contracts for discriminatory treatment do not qualify as "grounds *** for the revocation of any contract" and therefore fall outside Section 2's savings clause. See Pet. Br. ("PB") 27-28. But the Court has never said the converse—*i.e.*, that the savings clause immunizes every state-law rule that is not facially discriminatory.

That is unsurprising, because the word "discrimination" does not appear in Section 2. Instead, that provision specifies that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract" (emphasis added).

The use of the modifier "any" indicates that Congress never intended to allow States to invalidate arbitration provisions on the basis of rules that apply only to a narrow subset of non-arbitration agreements. This Court repeatedly has recognized that "the word 'any' has an expansive meaning." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting cases); see also *United States* v. *James*, 478 U.S. 597, 604-605 (1986). Congress's use of "the

expansive word 'any' and the absence of restrictive language [leaves] 'no basis in the text for limiting' the phrase 'any [contract]'" to mean a few non-arbitration contracts. *Ali*, 552 U.S. at 214 (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)).

The Court accordingly has said repeatedly that Section 2 saves only grounds that "arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis added); see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (Montana statute "directly conflicts with" Section 2 because it "conditions the enforceability of arbitration agreements on compliance with a special notice requirement *not applicable to contracts generally*") (emphasis added).

Indeed, that understanding is necessary to avoid rendering the statute a nullity. As respondents concede (RB14), the FAA was enacted to overturn the "ouster" doctrine. That doctrine applied both to arbitration provisions and other forum-selection clauses. See PB29-30. If Section 2 did no more than preclude facial discrimination against arbitration provisions, it would have failed to accomplish Congress's most basic purpose.[2]

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[2] Recognizing this, respondents say that the ouster doctrine would be preempted by Section 2 because it would have a "discriminatory effect" on arbitration. RB33. But that standard would equally invalidate California's near-categorical ban on provisions that require individual dispute resolution. Superimposing class-action procedures on arbitration changes the very character of arbitration. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-1776 (2010). By contrast, because class actions already are a feature of the litigation landscape, a facially neutral prohibition against agreements to re-

Similarly, it is inconceivable that the Montana statute invalidated in *Casarotto* would have been saved if only it had said: "Any contractual provision setting forth the means for resolving disputes shall be typed in underlined capital letters on the first page of the contract."

Unable to defend their interpretation of the savings clause, respondents claim that our reading of the clause is "incoherent" and would allow companies to escape application of statutes like the U.C.C. that codify "unconscionability and other general defenses" in the context of "specific categories of contracts." RB24-25. Not so. A rule is no less generally applicable merely because it *also* has been codified in a particular context.

But as *Perry* makes clear, to come within the savings clause, the rule must have arisen to govern contracts generally, not arbitration specifically—either directly or indirectly by regulating a gerrymandered subset of contracts, such as those involving dispute resolution. Were it otherwise, States would be able to superimpose on arbitration any procedure used in courts—jury trials, plenary discovery, application of the rules of civil procedure and evidence, etc.—by labeling it a "neutral" requirement for all dispute resolution agreements. See PB29-30.

Respondents recognize that an interpretation of the FAA permitting States to do that would not be credible, but their construction of Section 2 provides no basis for preempting such requirements: Rather, all of these rules would be permissible because they treat litigation and arbitration evenhandedly.

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solve disputes on an individual basis would have no similar impact on agreements that contemplate litigation.

Respondents suggest that such state law rules would be preempted because "the statute cannot be read to destroy itself by allowing States to require procedures that are fundamentally incompatible with arbitration." RB11; see also RB32-33. To avoid losing this case, however, respondents must explain why mandating full discovery procedures is "fundamentally incompatible with arbitration" but mandating the "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration" (*Stolt-Nielsen*, 130 S. Ct. at 1776) is not.[3]

Respondents' sole support for their purported distinction is this Court's observation that parties may agree to class-wide arbitration if they so choose. RB35. Yet the same could be said of the procedures that respondents admit States may not superimpose on arbitration. Parties undoubtedly *could* agree to have an arbitral jury or to arbitrate under the federal rules of evidence and civil procedure. See Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 573 PLI/Real 663, 670 (2009) (arbitration conducted under federal rules); http://www.i-courthouse.com (internet arbitration by jury).[4]

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[3] Respondents and their amici constantly say that ATTM "embedded" a class waiver in its arbitration clause, as if bilateral arbitration were an alien element. In fact, as *Stolt-Nielsen* recognizes, it is class procedures that are alien to arbitration.

[4] Respondents say that "because '[a]rbitration carries no right to trial by jury,' a rule forbidding jury-trial waivers would make arbitration agreements unenforceable in violation of Section 2." RB33 (quoting *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956)) (citation omitted). Of course, *Stolt-Nielsen* establishes that arbitration "carries no right" to class-wide proceedings either.

Respondents' argument therefore provides no reasoned basis for distinguishing among various procedural requirements. Either respondents' construction of the statute must be rejected because it would not preclude States from mandating the use of litigation procedures in arbitration, or respondents' concession that the FAA preempts States from requiring procedures that are "fundamentally incompatible" means that the *Discover Bank* rule is preempted as well.

2. The *Discover Bank* rule is not saved from preemption merely by labeling it an application of California unconscionability and exculpatory-clause principles.

Respondents also argue that the *Discover Bank* rule is simply an evenhanded application of California's general contract-law defenses. We agree that "the FAA does not preclude States from applying general contract defenses, such as unconscionability" (RB34). But that is not what happened here.

Under *Discover Bank*, provisions requiring bilateral arbitration are unenforceable whenever the plaintiff *alleges* that the defendant cheated large numbers of consumers out of small amounts of money—even when, as here, consumers are fully able to vindicate their claims on an individual basis. This rule—whose application is unrelated to the fairness of the arbitration provision—was created especially for provisions requiring bilateral arbitration and deviates markedly from generally applicable unconscionability and exculpatory-clause principles.

Respondents argue that it is irrelevant whether the *Discover Bank* rule "represent[s] a departure from" generally applicable California contract-law

principles because that constitutes "'a question of state law, which this Court does not sit to review.'" RB35-36 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989)).[5] In respondents' view, so long as a decision invokes the "unconscionability" label, that is the end of the matter even if it rests on legal principles that are entirely different from those applied to determine unconscionability outside the arbitration context.

Respondents are simply wrong that this Court is powerless to look beyond the label that state courts affix to the rationale they give for invalidating arbitration provisions. As respondents' own amici acknowledge, the question whether a state-law ground for invalidating an arbitration provision falls within Section 2's savings clause "arises under federal law." Federal Jurisdiction Professors Br. 6. Indeed, as they further acknowledge, this Court's FAA precedents "suggest[] that a 'generally applicable' rule of state contract law does not exist simply because a state court *says* that it does." *Id.* at 7 (citing *Perry*, 482 U.S. at 492 n.9).

Amici also correctly point out that this situation is analogous to the independent-and-adequate-state-grounds doctrine. *Id.* at 8. In that context, this Court "has analyzed, in dozens of cases, whether state procedural rules purportedly precluding federal review have been 'firmly established and regularly

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[5] *Volt* held that issues of *contract interpretation* are matters of state law that this Court does not review. That holding lends no support to respondents' submission that this Court is powerless to determine whether a rule employed to invalidate an arbitration provision is one of general applicability.

followed.'" *Ibid.* (quoting *James* v. *Kentucky*, 466 U.S. 341, 348 (1984)).

Amici contend that the analogy to the independent-and-adequate-state-grounds context dictates that the party arguing preemption must show that "the rule of state contract law at issue is *not* in fact 'generally applicable.'" *Id.* at 10. Although the Court need not answer the burden question to decide this case, Section 2 places the burden on respondents, not us. Because the statute specifies that arbitration provisions must be enforced according to their terms *unless* they are revocable under a generally applicable state-law principle, it follows that the party seeking to avoid enforcement has the burden of proving that the state-law principle is, indeed, generally applicable. In any event, we *have* established that the *Discover Bank* rule deviates markedly from generally applicable contract-law principles.

a. Unconscionability.

We demonstrated in our opening brief that the *Discover Bank* rule deviates from generally applicable unconscionability principles in multiple ways.[6]

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[6] Respondents repeatedly represent that 19 other States have interpreted their unconscionability law the same way that California has. That is false. The overwhelming majority of those States have held that provisions requiring bilateral arbitration are unenforceable only when they would preclude customers from vindicating their claims. See App., *infra*, 1a-6a. Indeed, courts in five of those States—Alabama, Florida, Illinois, Michigan, and West Virginia—have *enforced* ATTM's current arbitration provision or a predecessor version. See *ibid.* And that provision indubitably would be upheld in Delaware, Georgia, Ohio, and Pennsylvania, where courts have upheld arbitration clauses that were materially less consumer-friendly than

Respondents' effort to demonstrate that *Discover Bank* is a straightforward application of California unconscionability principles does not withstand scrutiny.[7]

(1) Respondents mischaracterize California's generally applicable unconscionability principles.

Although respondents dispute our showing (PB32-34) that California limits the concept of substantive unconscionability to contract terms that shock the conscience (RB38-39), they cite no Califor-

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AT&TM's. *See ibid.* The enforceability of AT&TM's arbitration provision is an open question in most of the remaining States.

[7] Respondents deny that *Discover Bank* effectuates an across-the-board rule, citing a smattering of cases enforcing provisions that required bilateral arbitration. RB20 & n.14. Whether *Discover Bank* effectuates a categorical rule is beside the point, because the courts below construed it to require invalidation of AT&TM's arbitration clause notwithstanding that "[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim" (Pet. App. 11a n.9). In any event, the California Supreme Court has held that private claims for class-wide "public" injunctions are *categorically* non-arbitrable. *See Cruz* v. *PacifiCare Health Sys., Inc.*, 30 Cal.4th 303 (2003); *Broughton* v. *Cigna Healthplans*, 21 Cal.4th 1066 (1999). Two additional appellate decisions have held that the California Legal Remedies Act *categorically* precludes parties from agreeing to resolve claims under that Act on a bilateral basis. *Fisher* v. *DCH Temecula Imports LLC*, 187 Cal.App.4th 601 (2010); *America Online, Inc.* v. *Super. Ct.*, 90 Cal.App.4th 1 (2001). And another holds that provisions requiring bilateral arbitration may be invalidated as a matter of public policy whenever a court determines that a class action would be "a preferable means of vindicating" *any* non-waivable statutory claim. *Arguelles-Romero* v. *Super. Ct.*, 184 Cal.App.4th 825, 845 (2010). These holdings underscore that California courts will invalidate any consumer-arbitration provision that requires bilateral arbitration.

nia case to the contrary. One group of amici cite *A&M Produce Co.* v. *FMC Corp.*, 135 Cal.App.3d 473 (1982). *See* Contracts Professors Br. 15. But even if *A&M* were indeed "the leading California appellate case" as amici assert, the standard it articulates is not meaningfully different from the shocks-the-conscience standard. As the *A&M* court explained it, "a contractual term is substantively suspect if it reallocates the risks of the bargain in an *objectively unreasonable* or unexpected manner." 135 Cal.App.3d at 487 (emphasis added). Because the district court found that "a *reasonable* customer may well prefer" bilateral arbitration under AT&TM's provision to participating in a class action (Pet. App. 42a (emphasis added)), it is manifest that the *Discover Bank* rule deviates even from the allegedly more relaxed *A&M* standard.

Respondents are no more successful in refuting our showing that the *Discover Bank* rule deviates from generally applicable unconscionability principles by focusing on the alleged effects on non-parties of respondents' agreement to arbitrate bilaterally. RB44-47. Not one case that they or their amici cite holds that an agreement that is fair to the parties before the court may nonetheless be deemed unconscionable because of its impact on non-parties. Indeed, virtually all of the authorities cited by respondents involve the separate "exculpatory clause" rationale, which we address below.

Respondents also fail to refute our demonstration that generally applicable principles of unconscionability law turn on whether the challenged term is conscience shocking (or "objectively unreasonable") *at the time of contracting*. In contending that *Discov-*

er Bank's *ex post* focus is "a *limitation*, not an expansion, of the test" (RB47), they miss our point entirely. Under the generally applicable *ex ante* approach, AT&TM's arbitration provision would not be deemed unconscionable because courts would consider the range of possible outcomes as of the time of contracting: (i) the customer never has a dispute and thus incontrovertibly benefits from the cost savings associated with substituting AT&TM's process for judicial class actions; (ii) the customer has only inherently individualized disputes that could never be brought as class actions and hence would be unlikely to be redressed through the judicial process (see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995)); and (iii) the customer does have at least one dispute that is appropriate for class-wide resolution, in which event she is likely to recover only pennies on the dollar in the event she bothers to file a claim at all—in contrast to the "prompt[]" and "full" compensation that she would likely receive under AT&TM's provision (see Pet. App. 41a-42a). It would not be "objectively unreasonable" for a customer confronted with this range of outcomes *ex ante* to agree to AT&TM's arbitration provision.

Under the *Discover Bank* approach, in contrast, this same provision that "a reasonable person may well prefer" (Pet. App. 42a) *ex ante* is deemed invalid by viewing it through the much narrower *ex post* lens of an already-filed class action that carefully alleges the three elements of the *Discover Bank* test. The contract at issue in *American Software, Inc.* v. *Ali*, 46 Cal.App.4th 1386 (1996), which resulted in nonpayment of commissions amounting to 40% of the plaintiff's annual salary, could never have survived

under this idiosyncratic, *ex post* approach. See also DRI Br. 9-14.

(2) Respondents' eleventh-hour argument that AT&TM's arbitration provision is "unfair" to them is misguided.

Unable to demonstrate that generally applicable California unconscionability law focuses on the impacts of a contract on non-parties, respondents change course and argue that AT&TM's arbitration provision in fact is "not fair" to them. RB39. Of course, both courts below effectively found otherwise. The district court found that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars" (Pet. App. 42a) and that "the Concepcions arguably would be better off to individually pursue their claim in arbitration" because "their net recovery may be larger and more quickly paid through AT&TM's informal claims and arbitration process" (*id.* at 47a n.10). And the Ninth Circuit found that AT&TM's provision "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim" and that "the problem with it under California law *** is that not every aggrieved customer will file a claim." *Id.* at 11a n.9.

These findings below framed the issue on which this Court granted review, which takes as given that the Concepcions are fully able to vindicate their claims under AT&TM's arbitration provision. Even if this Court were to consider respondents' "fairness" argument, the standard is not one of simple,

subjective fairness. Under generally applicable unconscionability principles, a contractual term must be conscience-shocking or, at minimum, "objectively unreasonable" before a California court will deem it unenforceable. See pages 9-10, *supra*; PB3-4, 32-33.

In any event, respondents' claims of unfairness rest on a misunderstanding of the way in which AT&TM's arbitration provision functions. As the district court found, the provision creates powerful incentives for AT&TM to resolve customers' complaints without the need to initiate an arbitration. Because AT&TM has undertaken to pay the full $1,700 cost of arbitration and because it has an independent interest in satisfying its customers, its customer-service department generally will resolve customers' complaints at the very outset. Indeed, AT&TM provides customers with over $1.3 billion in bill credits every year. Pet. App. 44a. If a customer is not satisfied with the resolution offered by the customer-service department, she need only fill out a simple, one-page Notice of Dispute. As the district court found, AT&TM has a strong incentive to offer the customer many times the value of the claim (plus a reasonable amount of attorneys' fees if the customer is represented by counsel) in order to avoid the risk of having to fund an arbitration and the possibility of having to pay the premiums. *Id.* at 37a-39a.

For this reason, respondents and their amici are mistaken in assuming that, to be made whole, customers would need to expend any significant amount of time or money investigating their claims and developing legal theories that would survive dispositive motions if the claims were brought in court. It makes economic sense for AT&TM to resolve virtual-

ly all disputes without determining whether the customer has a legally cognizable claim. For example, amici Marygrace Coneff *et al.* contend that the complexity of their small-dollar claims would deter lawyers from representing them. Coneff Br. 17. But complex expert testimony is unnecessary in order to obtain a resolution of their claims under AT&TM's arbitration provision. If a simple phone call to customer service complaining about call quality would not have gotten them an acceptable resolution, the filing of a Notice of Dispute surely would have.[8]

In short, as the district court found, even if no customer ever receives the premiums, AT&TM's arbitration provision "serve[s] a noble purpose" by creating a process that is "quick, easy to use, and prompts full or, as described by [respondents], even excess payment to the customer *without* the need to arbitrate or litigate." Pet. App. 39a. And if the customer is dissatisfied with AT&TM's offer, she may proceed to fully subsidized arbitration with its prospect for a substantial windfall. Such a customer ordinarily would be able to arbitrate her claims simply by explaining them to the arbitrator and, if necessary, presenting modest documentary evidence, such as her bills. See *Francis* v. *AT&T Mobility LLC*, 2009

[8] The Coneff brief is replete with distortions of the record in that case—including aspersions on the integrity of the late Richard Nagareda. To note but one distortion, the brief supplies a misleading partial quotation of an answer by counsel for AT&TM to a question about the premiums. Coneff Br. 14. The complete quote, with the omitted part italicized is: "If you're asking me how often are the premiums paid out, I don't think it happens, *because AT&T is so motivated to resolve the disputes at the outset of the arbitration process*." Tr. at 9, *Coneff* v. *AT&T Corp.*, *supra* (May 19, 2009).

WL 416063, at *7-*9 (E.D. Mich. Feb. 18, 2009). If that is "unfair," it is impossible to imagine any contract between a business and a consumer being safe from invalidation.

Respondents also contend that the requirement to arbitrate bilaterally was "unfair" because "they were forced to give up *** the compensatory, deterrent, and cost-spreading effects of class actions brought on their behalf by others." RB41. Here again, it is not conscience-shocking or "objectively unreasonable" to give up these supposed benefits in exchange for quick, easy, and effective resolution of one's own disputes. In any event, as just discussed, respondents would not forgo any compensatory benefits by pursuing relief under AT&TM's arbitration provision rather than participating in a class action brought by others, and there is no need for cost-spreading because neither discovery nor expert testimony is generally necessary for AT&TM customers to obtain relief. Finally, it makes no sense to say that respondents' agreement is unfair to them because of the (alleged) reduction in deterrence resulting from other customers' entry into similar agreements. Indeed, respondents cannot identify a single case outside the arbitration context in which a contract has been declared unconscionable because of the effects on the party of agreements entered into by non-parties.

b. California's exculpatory-clause statute.

(1) The California courts have never applied the exculpatory-clause statute to a contract that does not exculpate one party from liability to its counterparty.

Respondents and their amici take issue with our submission (PB40-41 & n.12) that the manipulability of "public policy" counsels caution in determining whether the savings clause encompasses public-policy grounds. As noted in our opening brief, the Court need not resolve that question here because the *Discover Bank* rule rests on an interpretation of the exculpatory-clause statute that does not apply to other kinds of contracts. Specifically, while the courts below deemed AT&TM's arbitration provision to be an unenforceable "exculpatory clause" because *non-parties* might not choose to pursue claims (Pet. App. 11a n.9, 43a-45a), California courts have not deemed any other kind of contract to be impermissibly exculpatory solely because of its effects on non-parties.

Respondents contend that the exculpatory-clause doctrine long has been concerned with the effects of contracts on the public at large. RB44-47. But neither they nor any of their amici can cite a single case invalidating a contract as exculpatory even though the contract placed no restrictions on the ability of the party before the court to obtain complete relief. *Every* case they cite involved a clause that waived a party's own claims against its counter-party for the latter's negligence, disclaimed warranties, or eliminated remedies.

Some of those cases say that the contracts in question affected the public interest—because that is

a prerequisite for invalidating an exculpatory clause. See, *e.g.*, *Tunkl* v. *Regents of Univ. of Cal.*, 60 Cal.2d 92 (1963); *Hiroshima* v. *Bank of Italy*, 78 Cal.App. 362 (1926). But that is a far cry from invalidating a contract that does not actually exculpate one party from liability to its counterparty.

If the exculpatory-clause statute did extend to "anything that would indirectly reduce a defendant's aggregate liability," as respondents seem to contend, it would encompass many routine characteristics of arbitration and litigation. For example, the law does not require individuals with claims common to many people to file them as class actions. And if they do choose to go it alone and settle their claims, the law permits them to do so on a confidential basis. Yet under respondents' theory, that would undermine the goal of notifying similarly situated persons, and thereby potentially reduce the defendants' aggregate liability. Similarly, respondents' concept of exculpation would require that all arbitral awards be published and given collateral-estoppel effect in future disputes involving the same defendant.

For all of these reasons, *Discover Bank* cannot be justified as an even-handed application of California's statute governing exculpatory clauses.

(2) AT&TM's arbitration provision does not exculpate it from liability to non-parties.

For the reasons just stated, it is legally irrelevant whether AT&TM's arbitration provision in some sense "exculpates" it from liability to non-parties. In any event, respondents and their amici are mistaken that it does. Their contention rests almost exclusively on statistics showing that few customers actually file arbitrations against AT&TM. But as the district

court found, AT&TM generally will resolve the claims of its customers "*without* the need to arbitrate or litigate." Pet. App. 39a. True, as the Ninth Circuit concluded, "not every aggrieved customer will file a claim" (*id.* at 11a n.9), but that is equally (if not more) true of class actions—especially ones like this, in which most customers are unlikely to think that AT&TM did anything wrong; the claims are inherently individualized, making class certification questionable at best; and the likelihood of a settlement for more than a few pennies on the dollar is low.

Similarly mistaken is the assertion by some amici that, if class actions are unavailable, attorneys would have no incentive to represent customers in arbitrations. To begin with, as the district court found, AT&TM has a policy of including reasonable attorneys' fees in settlement offers to customers who are represented by counsel in filing Notices of Dispute or Demands for Arbitration. Pet. App. 38a n.7.[9] Moreover, nothing would stop an enterprising lawyer from creating a Notice of Dispute mill—advertising for clients and then using the incentives AT&TM has created to obtain settlements well in excess of the value of each client's claim. One group

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[9] One amicus cites to declarations of attorneys who asserted that they would be unwilling to represent consumers in bilateral arbitration. Coneff Br. 11-13. In both that case and others, however, AT&TM has introduced declarations from lawyers who *would* be willing to represent consumers in bilateral arbitration under AT&TM's provision. See Docket Nos. 54-60, *Coneff* v. *AT&T Corp.*, No. 2:06-cv-944-RSM (W.D. Wash.); Docket Nos. 32-35, *Cruz* v. *Cingular Wireless, LLC*, No. 2:07-cv-714-JES-DNF (M.D. Fla.); Docket Nos. 23-24, *Powell* v. *AT&T Mobility, LLC*, No. CV-09-CO-1800-LSC (N.D. Ala.); see also Docket No. 57 Exs. 1, 4, *Hancock* v. *AT&T, Inc.*, No. 5:10-cv-822-W (W.D. Okla.) (AT&T's functionally identical provision).

of amici inadvertently makes this very point. They note that after issuing a press release announcing a lawsuit against AT&TM, they were contacted by 4,700 customers with similar complaints. Coneff Br. 10. They easily could have filled out Notices of Dispute for each of these 4,700 customers and either obtained acceptable settlements or had the opportunity to pursue the premiums in serial arbitrations. That would have been more than enough financial incentive for most lawyers.

The contention of some amici that class actions are indispensable to ensure that customers learn of potential claims is mistaken for several reasons. First, because AT&TM's arbitration provision does not require confidentiality, lawyers and consumer advocates may disseminate information about alleged wrongdoing "in the manner of their choosing." *Cruz* v. *Cingular Wireless LLC*, 2008 WL 4279690, at *4 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-CC (11th Cir.). For that reason, and because of the prevalence of blogs, internet forums, and other media, widespread problems are highly unlikely to go undiscovered. Second, because customers who feel aggrieved by a service or charge do not have to identify a cause of action against AT&TM in order to obtain redress under AT&TM's arbitration provision, the assumption that customers need "notice" that they supposedly have been defrauded is mistaken. Third, the assumption that class actions actually serve a meaningful notice function is tenuous at best. See, *e.g.*, Eisenberg & Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("class members display by their behavior that they do not value the right to receive notice"). Certainly, there is no evidence in the record of this

case that any more than a small fraction of putative class members even read class notices.

The contention that AT&TM's arbitration provision cannot adequately replicate the deterrent effect of class actions is wrong on multiple levels as well. First, by exposing itself to the risk of serial Notices of Dispute seeking more than the face amount of customers' economic injuries, AT&TM *has* created a powerful deterrent against systemic wrongdoing.

Second, for the reasons stated in the Chamber of Commerce's amicus brief (at 7-11), the assumption that class actions have a significant deterrent effect is dubious. See also PB46 n.14.

Third, the principal mechanism of deterrence (aside from the desire to retain customers) is government enforcement. To take one recent example, notwithstanding respondents' suggestion that the FCC is an apathetic regulator of the wireless industry, its investigation into alleged inaccurate data charges by Verizon Wireless resulted in an agreement by Verizon to refunds in excess of $50 million. See *FCC: Verizon, Can You Pay Me Now?*, PCWORLD, Oct. 28, 2010, http://www.pcworld.com/article/209126/fcc_verizon_can_you_pay_me_now.html. The States too are fully capable of investigating and punishing true misconduct—as opposed to the kind of lawyer-driven claims that characterize many class actions, including the current one. See South Carolina/Utah Br. 5-6.

For all of these reasons, the *Discover Bank* rule cannot be saved from preemption as an even-handed application of California's statutory prohibition against exculpatory clauses.

B. The *Discover Bank* Rule Stands As An Obstacle To The Accomplishment Of The Full Purposes And Objectives Of Congress In Enacting The FAA.

We explained in our opening brief that the *Discover Bank* rule is preempted for the additional reason that it stands as an obstacle to the accomplishment of two key purposes of the FAA: (i) to ensure that parties have the flexibility to select their own dispute-resolution procedures; and (ii) to remove impediments to arbitration. Respondents concede that these were indeed core purposes of the FAA (see RB49), but contend that they are not sufficiently embodied in the text of the FAA to preempt state law. They are mistaken as to each.

The objective of enabling parties to select the procedures that will govern their arbitration is directly conveyed and carried out by Sections 2, 3, and 4, each of which make arbitration agreements enforceable according to their terms. It thus is not surprising that this Court repeatedly has based its FAA decisions on this principle. See PB24-26. Congress's goal of removing impediments to arbitration is equally evident from the text and structure of the statute. Indeed, that was the raison d'être for Section 2. In short, if these two purposes cannot serve as bases for conflict preemption, it is hard to see which purposes could.

Respondents' arguments that California law does not stand as an obstacle to accomplishment of these objectives do not withstand scrutiny.

1. Respondents misapprehend our first conflict-preemption argument. It is not our position that the FAA preempts state-law defenses to procedures that

are so "unfair" to the plaintiff as to warrant the inference that she never truly assented. See RB50-51. In that circumstance, there would be no contractual choice to protect.

Similarly, our position would not prevent States from declaring that arbitration agreements must ensure that parties can vindicate their claims. What they may not do is dictate the procedures used to provide that assurance. Because AT&TM's arbitration provision both encourages consumers to pursue their claims (Pet. App. 39a-40a, 42a) and "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim" (*id.* at 11a n.9), however, it is manifest that California has sought to exalt the class-action procedure, not simply ensure that AT&TM's customers are able to vindicate their claims. See also *Fisher*, *supra*; *Arguelles-Romero*, *supra*.

Respondents offer no intelligible means of distinguishing California's naked policy preference for the class-action procedure from its preference for administrative exhaustion of claims under the California Talent Agents Act. See *Preston* v. *Ferrer*, 552 U.S. 346 (2008). Just as the exhaustion requirement frustrated the FAA's objective of enabling parties to arbitration agreements to contract for "streamlined proceedings and expeditious results" (*id.* at 357-358), so too does California's categorical preference for class-wide dispute resolution.

Elsewhere in their brief, respondents concede that state-law rules requiring procedures that are "incompatible with arbitration" would be preempted because they "directly conflict" with the statute. RB32. If, as they concede, the doctrine of conflict preemption precludes States from insisting that

parties agree to have written arbitral awards, fact-finding by juries, and plenary discovery and motion practice, however, it equally precludes States from insisting that parties' agreements allow for class-wide proceedings. See pages 4-6, *supra*. All of these requirements would frustrate the FAA's purpose of enabling parties to structure their dispute-resolution procedures to achieve streamlined proceedings and expeditious results, at reduced expense.

2. With respect to our second conflict-preemption argument, respondents accuse us of exaggerating the likelihood that companies will abandon arbitration if the price of admission is acquiescence in class-wide proceedings. They point to two cases in which companies made a one-time, post hoc representation that, if the requirement of bilateral arbitration were invalidated, they would nonetheless prefer arbitration to staying in court. RB53. But those idiosyncratic decisions, made after litigation had commenced and a judge had been assigned, in no way mean that these or any other company would be willing to enter into pre-dispute arbitration provisions that authorize class-wide arbitration. Indeed, neither respondents nor any of their amici can identify even one company that does so.

Respondents assert that, even if no company would authorize class-wide arbitration, all companies would be free to adopt a bifurcated approach under which "the vast range of claims by consumers and employees" that are individualized in nature could continue to be arbitrated, while disputes pleaded as class actions could be brought in court. RB54-55. They claim that "[t]he securities industry has followed precisely that approach for the past 18 years." RB55. But "that approach" is a matter of

regulatory command, not contractual choice. See FINRA Rules 12200 (requiring firms to arbitrate individual claims upon customer's request), 12204(d) (forbidding arbitration of claims pleaded as a class actions).

It is unsurprising that respondents have no examples of companies volunteering for the same arrangement. The AAA requires businesses to pay all but $125 of the $1,700 cost of consumer arbitrations. Businesses would have little incentive to subsidize bilateral arbitration—much less provide the affirmative inducements that are the hallmark of ATTM's arbitration provision—if, at the end of the day, they still must litigate in court every claim pleaded as a class action. Instead, companies will give up on arbitration entirely, burdening the courts with additional cases and leaving customers "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery" (*Allied-Bruce*, 513 U.S. at 281). Nothing could be more inimical to the objectives of the FAA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A

States in Respondents' Appendix That Invalidate Agreements Requiring Bilateral Arbitration Only If They Exculpate The Defendant From Liability To The Plaintiff

State	Decisions
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Florida	*S.D.S. Autos, Inc.* v. *Chrzanowski*, 976 So.2d 600, 608 (Fla. Dist. Ct. App. 2007); *Fonte* v. *AT&T Wireless Servs., Inc.*, 903 So.2d 1019, 1027 (Fla. Dist. Ct. App.), *rev. denied*, 918 So.2d 292 (Fla. 2005); *Cruz* v. *Cingular Wireless LLC*, 2008 WL 4279690, at *3-#4 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-CC (11th Cir.); *La Torre* v. *BSF Retail & Commercial Operations, LLC*, 2008 WL 5156301, at *5 (S.D. Fla. Dec. 8, 2008); *Rivera* v. *AT&T Corp.*, 420 F.Supp.2d 1312, 1321-1322 (S.D. Fla. 2006); *Hughes* v. *Alltel Corp.*, 2004 U.S. Dist. LEXIS 20705, at *13 *15 (N.D. Fla. Mar. 31, 2004).

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Ohio	*Alexander* v. *Wells Fargo Fin. Ohio 1, Inc.*, 2009 WL 2963770, at *3 (Ohio Ct. App. Sept. 17, 2009); *Hawkins* v. *O'Brien*, 2009 WL 50616, at *6 (Ohio Ct. App. Jan. 9, 2009); *Credit Acceptance Corp.* v. *Davisson*, 644 F.Supp.2d 948, 959 (N.D. Ohio 2009); *Stachurski* v. *DirecTV, Inc.*, 642 F.Supp.2d 758, 772 (N.D. Ohio 2009); *Price* v. *Taylor*, 575 F.Supp.2d 845, 854 (N.D. Ohio 2008); *Howard* v. *Wells Fargo Minn., NA*, 2007 WL 2778664, at *4-*5 (N.D. Ohio Sept. 21, 2007).
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West Virginia	*State ex rel. AT&T Mobility, LLC v. Shorts*, No. 35537 (W. Va. Oct. 28, 2010); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Wince* v. *Easterbrooke Cellular Corp.*, 681 F.Supp.2d 679, 685 (N.D. W. Va. 2010); *Strawn* v. *AT&T Mobility LLC*, 593 F.Supp.2d 894, 898-900 (S.D. W. Va. 2009); *Miller* v. *Equifirst Corp.*, 2006 WL 2571634, at *16 (S.D. W.Va. Sept. 5, 2006); *Schultz* v. *AT&T Wireless Servs., Inc.*, 376 F.Supp.2d 685, 690-691 (N.D. W. Va. 2005).
Wisconsin	*Coady* v. *Cross Country Bank, Inc.*, 729 N.W.2d 732, 745 (Wis. Ct. App. 2007).

SUPPLEMENTAL BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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May 7, 2010

This brief addresses two recent developments: the Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International*, 559 U.S. ___ (Apr. 27, 2010), and the order granting certiorari, vacating, and remanding ("GVR") in light of *Stolt-Nielsen* in *American Express Company v. Italian Colors Restaurant*, No. 08-1473 (May 3, 2010).

1. *Stolt-Nielsen*—which discussed neither unconscionability nor FAA preemption—has no bearing on this case and does not undermine any of the reasons for denying review set forth in our brief in opposition.

Stolt-Nielsen concerned whether parties could be compelled to arbitrate on a classwide basis where they had not agreed to do so. That issue is not remotely present in this case, and does not bear on the question presented. Here, there is no dispute that AT&T's agreement forecloses all classwide proceedings. The issue here is not (as in *Stolt-Nielsen*) whether a party may be compelled to participate in class arbitration in the face of an agreement that does not authorize it, but rather whether the agreement itself may be held invalid, under generally applicable state contract law, because it excludes class remedies. *See* 9 U.S.C. § 2 (arbitration agreements are valid and enforceable, "save upon such grounds as exist in law or equity for the revocation of any contract").

The Court did not address that issue in *Stolt-Nielsen*, and no party raised it. Indeed, the Court made clear that the arbitral decision under review there did not rest on general contract law at all. Slip op. at 8 (panel "did not attempt to determine what rule would govern under either maritime or New York law"). And the circumstances of that case—involving a shipping contract between large and sophisticated commercial entities—would not have presented a serious question of unconscionability even if the issue had been raised.

Nor does *Stolt-Nielsen* imply any particular resolution of the question whether the FAA preempts general principles of state contract law that would render unconscionable particular agreements that foreclose class arbitration. That a valid arbitration clause may not be read to impose class arbitration on a party that never contracted to engage in it does not suggest that any arbitration clause that precludes class arbitration is necessarily valid or that declining to enforce such a clause would violate the FAA.

In any event, whatever implications *Stolt-Nielsen* might have for FAA preemption—and, in particular, for the uniform view of the state and federal courts that the FAA does not preempt state contract principles making particular class action bans unconscionable—should be left for lower courts to unearth in the first instance. Until a court concludes that *Stolt-Nielsen* has some relevance to the question presented, or adopts AT&T's preemption theory, plenary review by this Court would be premature.

2. A GVR order is unwarranted here. Such an order is "potentially appropriate" when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration[.]" *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see Wellons v. Hall*, 130 S. Ct. 727, 732 (2010) (Scalia, J., dissenting) (GVR authority is not a general "power to send back for a re-do"). Here, no such "reasonable probability" exists because, as discussed above, *Stolt-Nielsen* has no bearing on the decision below.

Nor does the GVR in *American Express* suggest the appropriateness of a GVR here. *American Express*, like *Stolt-Nielsen*, was an antitrust dispute between com-

mercial entities in which the Second Circuit found class arbitration appropriate. *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009). There, the court held that precluding classwide arbitration under the circumstances was inconsistent with *federal* law. It did not address the validity of the agreement under generally applicable state contract law, and thus did not address the question of FAA preemption.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[1] The petition in *American Express*, filed in May 2009, was being held for *Stolt-Nielsen* until this week. During that period, the Court denied at least one petition on the question presented here. *See Athens Disposal Co. v. Franco*, 130 S. Ct. 1050 (2010).

AMICUS CURIAE BRIEF

No. 09-893

In The
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AT&T MOBILITY LLC,

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v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. These goals would be seriously undermined if, as petitioner claims, the Federal Arbitration Act (FAA) precludes states from applying their ordinary tools for policing unconscionable contracts to protect consumers from waiving their rights to bring class actions or class arbitrations, which are essential to the enforcement of antitrust and other consumer protection laws.[1]

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* has made a monetary contribution to its preparation or submission.

AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 100 prominent antitrust lawyers, law professors, economists, and business leaders. AAI's Board of Directors alone has approved of this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions.

INTRODUCTION

The Supreme Court of California, recognizing that "class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights," adopted an unremarkable rule that waivers of class arbitration or class actions that "operate effectively as exculpatory contract clauses" in consumer adhesion contracts are unconscionable. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108-09 (Cal. 2005). Applying *Discover Bank* to respondents' false advertising claims here, the Ninth Circuit found that petitioner's class arbitration waiver was "in effect an exculpatory clause," Pet. App. 11a, because "aggrieved customers will predictably not file claims . . . thereby 'greatly reduc[ing] the aggregate liability' AT&T faces for allegedly mulcting small sums of money from many consumers," *id.* 10a-11a (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986 (9th Cir. 2007)). Similarly, the district court concluded that petitioner's dispute-resolution mechanism would "vitiate the therapeutic effect of class actions in halting fraudulent conduct," primarily because it would allow petitioner to "avoid potential liability to thousands of . . . customers who have no knowledge of the alleged wrongdoing." *Id.* 43a, 45a (internal quotation marks omitted).

California's treatment of class action waivers, as applied by the Ninth Circuit in this case, is entirely consistent with this Court's rule, first articulated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

Inc., 473 U.S. 614 (1985), that an arbitration agreement is not enforceable when arbitration would not permit litigants to vindicate their statutory rights. *See Kristian v. Comcast Corp., Inc.*, 446 F.3d 25, 63 (1st Cir. 2006) ("As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis."). As petitioner's expert, Professor Nagareda, has written, "the court's analysis [in *Discover Bank*] ultimately speaks to the distortion that a foreclosure of aggregation might work, in a given instance, upon underlying substantive law." Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Presssure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1901 (2006); *see also Gentry v. Superior Court*, 165 P.3d 556 (2007) (applying *Discover Bank*'s "exculpatory effect" analysis to hold that class action waiver is not enforceable when it undermines the enforcement of non-waivable statutory rights).

In *Mitsubishi Motors,* this Court, while recognizing the importance of the private damages remedy to the enforcement of the antitrust laws, and that a "claim under the antitrust laws is not merely a private matter," overturned the then-uniform rule of the courts of appeals that federal antitrust claims were not arbitrable under the *American Safety* doctrine. *Mitsubishi Motors,* 473 U.S. at 635 (internal quotation marks omitted). The Court held that an agreement between businesses to arbitrate future antitrust claims could be enforced, "at least where the

international cast of a transaction would otherwise add an element of uncertainty to dispute resolution. . . ." *Id.* at 636. Importantly, however, the Court made clear that such an agreement would not be enforceable if arbitration would not permit the vindication of the litigant's statutory rights. The Court declared that "so long as the prospective litigant *effectively* may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," *id.* at 637 (emphasis added), but "in the event the choice-of-forum [*i.e.*, arbitration] and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy," *id.* at 637 n.19.

In *Randolph*, this Court reaffirmed that "claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (brackets in original). Under this line of cases, several courts of appeals have struck down class action (or arbitration) waivers that effectively would have insulated the defendant from plaintiffs' statutory claims. *See, e.g., Kristian*, 446 F.3d at 61 (holding class action waiver unenforceable

on the ground that "the social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield"); *In re American Express Antitrust Merchants' Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (holding class action waiver could not be enforced "because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery"), *vacated and remanded sub nom., American Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

The rationale for the vindication-of-statutory-rights exception to the enforceability of arbitration agreements is not merely, or even primarily, to protect the particular litigant before the court. If that were the case, then a knowing prospective waiver of statutory rights would be eminently enforceable. But such express waivers, even when negotiated between businesses, frequently are not enforceable, as is the case with claims under the antitrust laws. *See Mitsubishi Motors*, 473 U.S. at 637 n.19 (citing cases); *Kristian*, 446 F.3d at 48 (prospective waiver of treble damages is not enforceable); *American Express*, 554 F.3d at 319 ("an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy"). Rather, the rationale for non-waivability is largely to protect the *public's* interest in the private enforcement of the statute. *See Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) ("in view of the public interest in vigilant enforcement of the antitrust laws through

the instrumentality of the private treble-damage action," an agreement that confers even "a partial immunity from civil liability for future violations" is inconsistent with the antitrust laws). A private right of action under the antitrust laws protects the public because it serves "both [a] remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637. So, too, private remedies under many other statutes, including respondents' statutory claims for deception in this case, are non-waivable and serve "as a deterrent and check on public harm." *Walter v. Hughes Comm'ns, Inc.*, 682 F. Supp. 2d 1031, 1041 (N.D. Cal. 2010) (discussing California's Consumers Legal Remedies Act).

That the FAA is not intended to override substantive rights is equally applicable to state and federal law. *See, e.g., Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.) (applying vindication-of-statutory-rights analysis to state statutory rights). Accordingly, if a class waiver is unenforceable under the FAA when it prevents a plaintiff from effectively vindicating a statutory right in arbitration, even if the waiver is freely negotiated, it follows that the Act is no bar to recognizing a state's policy of refusing to enforce class arbitration waivers that operate to insulate a defendant from statutory claims when the waiver is imposed by a business on consumers in a contract of adhesion.[2]

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[2] While a plaintiff seeking to invalidate an arbitration agreement on the ground that it prevents the vindication of

(Continued on following page)

Indeed, petitioner conceded below that "arbitration provisions containing class-arbitration prohibitions may be substantively unconscionable when their enforcement would result in 'the effective elimination of consumers' private rights of action,'" but contended that "AT'TM's arbitration provision is not of that ilk." Mem. of Points and Authorities in Support of Def. AT&T Mobility LLC's Mot. to Compel Arbitration 15 (Mar. 13, 2008) (quoting declaration of Professor Nagareda). Petitioner had contended that its dispute-resolution mechanism would "facilitate the development of a market for fair settlement of consumer claims," but the district court found that petitioner "provided no evidence" to support this contention, noting in particular that it was unclear "how such a market would apprise consumers of alleged wrongdoing. . . ." Pet. App. 44a (internal quotation marks omitted).

In this Court, petitioner does not directly challenge the lower courts' determination that aggrieved

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statutory rights bears the burden of proof, *see Randolph*, 531 U.S. at 92, the same level of evidence is not necessarily required of a plaintiff that seeks to invalidate a class arbitration waiver (not arbitration altogether) as unconscionable. *See Shroyer*, 498 F.3d at 981-82 ("California courts apply a sliding scale, so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.") (internal quotation marks omitted); *see also* Nagareda at 1907 ("If any types of [class action waivers] should be the subject of concern here, surely it should be those that are not the products of actual bargaining and compromise. . . .").

customers will predictably not file claims thereby greatly reducing AT&T's aggregate liability. Rather, petitioner maintains that it is inappropriate (and "discriminatory" under the FAA's savings clause) for courts to consider the effect of a class action or arbitration waiver on the broader enforcement goals of private rights of action, *i.e.*, "social policy concerns relating to deterrence," Pet. Br. 19, 37, or "public policy" considerations relating to "non-parties," *id.* 39-44. Petitioner argues that courts should consider only the "fairness" to the named representative in the putative class action, and contends that its dispute-resolution mechanism "undeniably is fair to the Concepcions" because if they invoked it they likely would have been made whole. *Id.* 36. Petitioner and its *amici* also argue that class actions are not necessary to deter misconduct because government enforcement is sufficient, *see id.* 45, and that class actions or class arbitrations in any event "do[ ] not deter misconduct" because they force a defendant to settle "*regardless* of whether it acts unlawfully." Br. of the Chamber of Commerce of the U.S. as *Amicus Curiae* in Support of Pet'r 7, 10; *see* Pet. Br. 46 n.14.

SUMMARY OF ARGUMENT

1. Petitioner's disagreement with California's determination that the ability of consumers to aggregate small claims is an essential component of the enforcement of its consumer protection laws provides no legal basis for preempting California law,

as respondents' brief demonstrates. California law on class waivers applies equally to arbitration and non-arbitration agreements and reflects no hostility toward arbitration.

2. The class arbitration waiver here is not fair to the Concepcions or other consumers because no reasonable consumer would knowingly trade the right of consumers to aggregate their claims – which benefits all consumers by deterring and uncovering all manner of wrongful conduct, enhancing consumers' litigation posture, and providing compensation without the need to be informed of potential claims or engage an attorney – in exchange for the arguable benefits of petitioner's contrived dispute-resolution mechanism in promoting the settlement of one-off small claims that consumers are aware of and do not require an attorney to uncover or pursue. And there is no good reason to believe that AT&T (and other businesses) will withdraw from consumers the ability to arbitrate claims that are not susceptible to class treatment, if arbitration is indeed a cost-effective dispute resolution mechanism for individual claims.

3. The role of class actions in deterring wrongful conduct is appropriately considered in California's unconscionability analysis if, as petitioner asserts, the appropriate perspective is *ex ante*, *i.e.*, when a contract is entered and before any claims have arisen. Moreover, it would be anomalous not to take into account the legislative purpose in enacting consumer remedies. California is not alone in enacting private rights of action to aid in the enforcement of the laws

for a public purpose. The antitrust laws provide a canonical example. Private enforcement is the primary vehicle for enforcing the antitrust laws, sometimes supplementing government enforcement, sometimes acting as a substitute. It is widely recognized that class actions play a critical role in ensuring the effectiveness of private enforcement of antitrust and other laws.

4. Petitioner and *amici*'s argument that class actions and class arbitrations do not deter misconduct is unfounded in theory and in fact. Even if class actions resulted in some "false positives," that would hardly prove that the threat of class actions does not deter misconduct. In any event, the suggestion that businesses routinely settle meritless class actions with substantial payments is a myth. Indeed, it is belied by *amici*'s simultaneous claims that class actions insufficiently protect consumers because so few are actually certified and those that do are settled for too little, not too much.

ARGUMENT

I. THE FAA DOES NOT PREEMPT CALIFORNIA UNCONSCIONABILITY DOCTRINE

The Federal Arbitration Act does not preempt California unconscionability doctrine as applied by the Ninth Circuit to the class arbitration waiver at issue here. In "all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a

field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (ellipses in original); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 292 (1995) (Thomas, J., joined by Scalia, J., dissenting) ("To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather we must be 'absolutely certain' that Congress intended such displacement before we give pre-emptive effect to a federal statute.") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991)); *cf. California v. ARC America Corp.*, 490 U.S. 93 (1989) (holding that state antitrust claims by indirect purchasers were not preempted by federal antitrust law even though policies underlying federal law precluded indirect purchaser suits under federal law). Unconscionability doctrine and consumer protection legislation are areas of traditional state regulation. *See* Resp. Br. 18 (unconscionability); *ARC America Corp.* at 101 (unfair business practices). And it was hardly the "clear and manifest" purpose of Congress in enacting the FAA to preempt the states in these areas.

As set forth in respondents' brief, California's unconscionability doctrine as applied to arbitration agreements in *Discover Bank* does not conflict with the FAA for the simple reason that it applies even-handedly to non-arbitration agreements as well as

arbitration agreements. Nor does it reflect hostility towards arbitration at all, merely a policy determination that the inability to aggregate claims (in arbitration or court) may undermine the enforcement of state consumer protection laws. Such a determination is entitled to respect in our federalist system. "There is no federal policy favoring arbitration under a certain set of procedural rules," *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989), particularly when those rules would undermine substantive rights.

II. THE CLASS ARBITRATION WAIVER HERE IS NOT FAIR TO CONSUMERS

Petitioner asserts "the courts below effectively found that AT&TM's arbitration provision is fair to the Concepcions (and, indeed, any customer who invokes it)" because the courts accepted that an aggrieved customer that asserts a colorable claim is likely to have its claim paid without having to actually go through arbitration. Pet. Br. 35. But the courts below did *not* find the provision fair to the Concepcions or consumers generally. On the contrary, the courts concluded that the arbitration provision was substantively unconscionable precisely because aggrieved customers generally will not submit claims for small dollar amounts, and with good reason.

First, even if they suspect a violation of their rights, most rational consumers will not be willing to

spend the time and effort to pursue arbitration of small claims, such as the $30 in this case. As the Ninth Circuit concluded, "The problem with small damage claims is not that the monetary cost of arbitrating is greater than the potential recovery, but that a person normally will not find it worth the time or the hassle to try to recover such a small amount, even if that person spends no money to hire an attorney or to invoke the arbitration process." Pet. App. 10a n.8.

It is no answer to say that AT&T's incentive to avoid premium payments ensures that consumers will not actually have to go through the arbitration process to receive compensation. A consumer must still send a written notice of dispute to AT&T by certified mail, which itself may not be worth the time and expense given the uncertainty of receiving any compensation. Then, the consumer may have to commence an arbitration proceeding, and be prepared to see it through, because the premium payment can be avoided by AT&T as long as it makes a qualifying settlement offer before the arbitrator is selected. Initiating arbitration requires a consumer to file two copies of another form with the American Arbitration Association (AAA), along with a copy of the arbitration agreement, and to pay a $125 filing fee, which AT&T promises to reimburse, or pay directly upon written request if the consumer "is unable to pay this fee." *Id.* 59a. In demanding arbitration, a consumer also must be willing to assume the risk that an arbitrator might determine the claim does not satisfy

"the standards set forth in Federal Rule of Civil Procedure 11(b)," in which case the payment of fees and expenses would be "governed by the AAA Rules." *Id.* 60a.

How many consumers would go through this trouble for the *possibility* of recovering $30, even if they believe their rights have been violated? The lower court's determination that few would is amply supported in logic and evidence. *See, e.g.*, Decl. of Neal S. Berinhout ¶ 19 (Mar. 13, 2008) (over 15-month period AT&T received 570 Notice of Dispute and Arbitration Initiation forms for claims of all sizes and types). Moreover, if millions of customers aggrieved by the same conduct did go through the trouble to assert a claim, it is not obvious that AT&T would be so quick to settle their claims.

Second, and more importantly, most customers will not know they are aggrieved or that their rights have been violated. Frequently, attorneys must ferret out wrongdoing and inform victims of their rights; that is a central function of class actions. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985) ("The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file the suit individually. . . ."); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 Law & Contemp. Probs. 75, 89 (2004) ("lack of information as to the existence of a possible claim will prevent most consumers from filing individual claims in arbitration or litigation").

Under petitioner's dispute-resolution mechanism, attorneys will have no incentive (or ability) to attract clients to pursue claims of wrongdoing.

To be sure, prevailing consumers can recover attorney's fees in arbitration when provided by the statutory cause of action, and AT&T claims it has a policy of including "reasonable attorney's fees in its settlement offers." Pet. Br. 10.[3] Yet while AT&T may have an incentive to pay a single consumer's small claim in full, it would have no incentive to make the attorney whole if the fees were significant, as they would be in any matter of complexity, particularly if the matter involved uncovering wrongdoing in the first place. AT&T would contend, with good justification, that it is unreasonable for a customer to incur tens or hundreds of thousands of dollars in attorney's fees in connection with a demand for only tens or hundreds of dollars. *See Kristian*, 446 F.3d at 59 n.21 ("In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to

[3] Although petitioner suggests that it is the threat of having to pay the premiums that provides the incentive to offer attorney's fees in the settlement, *see* Pet. Br. 10, that does not appear to be the case. *See* Reply Mem. in Supp. of Def. AT&T Mobility LLC's Mot. to Compel Arbitration 6, and accompanying Reply Decl. of Neil S. Berinhout (May 16, 2008). The attorney premium is apparently triggered by an award on the merits that is "greater than the value of AT&T's last written settlement offer" and less than $7500, Pet. App. 60a, so a settlement offer that fully satisfied the underlying claim without any attorney's fees would not trigger the premium.

prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court."). Moreover, developing a case may require enlisting the aid of experts, whose fees are not typically compensable under the lodestar methodology used in fee shifting statutes, *see American Express*, 554 F.3d at 318, and therefore would likely not be part of any settlement offer. In short, potential claims that require any significant effort by attorneys simply will not be investigated or brought.

Petitioner claims the "district court found that the Concepcions would likely be better off pursuing bilateral arbitration under AT&TM's arbitration clause than participating in a class action" because they would likely be made whole under AT&TM's dispute-resolution procedure, which is not necessarily the case under class arbitration. Pet. Br. 42. However, that is not what the district court found. Rather, the district court recognized the Concepcions themselves did not believe they would be "better off," as the litigation itself "demonstrated . . . their desire to forego their individual rights under the arbitration provision in order to pursue relief on behalf of a larger group of consumers," Pet. App. 47a n.10, which was their right under state law.[4] More significantly,

[4] The remedial provisions of the substantive laws at issue specifically provide for class or representative actions. *See* Cal. Civ. Code § 1781; Cal. Bus. & Prof. Code § 17203. Moreover, they give the Concepcions the right to seek an injunction on behalf

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what the Concepcions would do *ex post*, after consulting an attorney and becoming fully aware of their claims, is irrelevant if, as petitioner asserts, the proper perspective in determining unconscionability is *ex ante*, *i.e.*, at the time of contracting, in light "of all of the circumstances in which [the contractual provision] could apply." Pet. Br. 38.

From an *ex ante* perspective, before the consumer knows what claims may arise, no reasonable consumer would trade the right of consumers to bring class actions (or arbitrations) in exchange for the purported "benefits" of petitioner's arbitration clause. The right to bring collective actions deters, uncovers, and stops manifold wrongdoing by businesses – including anticompetitive conduct, fraud, deception, privacy breaches, and distributing harmful products, among other things – and provides compensation to consumers even when they have no idea they have been wronged. In contrast, petitioner's

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of the class to enjoin practices that constitute unfair competition (Cal. Bus. & Prof. Code § 17203), or unlawful methods, acts, or practices (Cal. Civ. Code § 1780(a)(2)). However, AT&T's arbitration clause permits an "arbitrator to award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." Pet. App. 61a. Thus, the Concepcions would have been precluded in arbitration from obtaining the injunction they sought to restrain AT&T "from engaging in [its] false advertising campaign and charging customers sales tax on any amount other than the amount each individual consumer pays for each cell phone. . . ." Complaint at 15 (Mar. 27, 2006).

dispute-resolution mechanism at best offers the benefit of promoting the settlement of small claims that a consumer is able to discover on her own and that do not require any attorney assistance or investigation, although even this benefit is largely illusory because AT&T would have a business incentive to settle one-off small claims of complaining customers regardless of the potential premium payments. *See* Decl. of Neal S. Berinhout ¶ 17 ("AT'TM generally attempts to accommodate customers who have complaints in order to retain them as customers.").

Petitioner's *amici* argue that individual arbitration is cheaper and more efficient than class actions or class arbitrations, and that businesses pass along these savings to all consumers. *See, e.g.*, Br. of CTIA – The Wireless Association® As *Amicus Curiae* in Supp. of Pet'r 17 ("The quantum of evidence, witnesses, and discovery involved in addressing a carrier's practices on a statewide or nationwide basis is exponentially larger than that needed to address a single customer's dispute."); Br. of *Amici Curiae* American Bankers Ass'n et al. in Supp. of Pet'r 13-14; Br. of the Center for Class Action Fairness as *Amicus Curiae* in Supp. of Pet'r 28-29. However, even if businesses would pass along their lower dispute-resolution costs to consumers, hardly a self-evident proposition in an industry as concentrated as the wireless industry, the relevant comparison should be between the cost and efficiency of thousands or millions of individual arbitrations and a single class arbitration; otherwise businesses' lower costs from individual arbitration

simply arise from their reduced payouts to consumers, *i.e.*, insulation from liability. *See Ting v. AT&T*, 182 F. Supp. 2d 902, 931 n.16 (N.D. Cal. 2002) ("[T]he notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws."), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).

In fact, class actions and arbitrations necessarily reduce transaction costs because a class action or arbitration may only go forward where the court or arbitrator determines it is "superior to other available methods for the fair and efficient adjudication of the controversy." American Arbitration Ass'n, Supp. Rules for Class Arbitration, Rule 4(b), http://www.adr.org/sp.asp?id=21936 (effective Oct. 8, 2003); *see* Fed. R. Civ. P. 23(b)(3) (virtually identical rule); *see also Shroyer*, 498 F.3d at 990-91 (discussing AAA Rule 4 and noting that class arbitration "will foster, not hamper, the efficiency and expeditious nature of arbitration").

Petitioner asserts, "AT&TM's arbitration provision provides customers with significant benefits, in comparison to the litigation system, *with respect to claims that are not susceptible to class treatment.*" Pet. Br. 38 (emphasis added); *see also id.* 53 ("'[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the

ability to choose expert adjudicators to resolve specialized disputes'") (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010)) (brackets in original). But it is not obvious that arbitration of small claims is superior to bringing a claim in small claims court, a right that consumers would always retain. Moreover, if arbitration of individual claims is indeed as cost beneficial as petitioner suggests, then one would expect AT&T to continue to offer individual arbitration as an option (or requirement) for consumers in cases that are not susceptible to class treatment. Yet petitioner and various *amici* contend that "businesses will give up on arbitration altogether" if the *Discover Bank* rule is upheld. Pet. Br. 53; *see also, e.g.*, Chamber of Commerce Br. 11-16; Wireless Ass'n Br. 20-21. This prediction is not credible, or else amounts to a repudiation of the virtues of arbitration that industry has been peddling for years.

Petitioner and its *amici* cite various companies' service agreements that state that the companies "will not seek to enforce" their arbitration agreements if the prohibition on class arbitrations cannot be enforced, *see, e.g.*, Pet. Br. 56, but these provisions do not mean that the companies categorically will refuse to arbitrate individual claims. It is unreasonable to maintain, as the Wireless Association does, "the Ninth Circuit's decision means that parties' requests for individual arbitration will not be honored by the courts." Wireless Ass'n Br. 19. At most, the decision means that such requests by businesses may not

be honored against a consumer that prefers to bring or participate in a class arbitration or class action.

In short, the waiver of consumers' rights to institute the best "available method[ ] for the fair and efficient adjudication of the[ir] controvers[ies]," AAA Rule 4(b), can hardly be considered fair or efficient for the Concepcions or other consumers.

III. THE ROLE OF CLASS ACTIONS IN AIDING PUBLIC ENFORCEMENT CANNOT BE IGNORED

Petitioner's argument (Br. 19-20) that it is inappropriate for courts applying California unconscionability doctrine to consider "social policy concerns relating to deterrence," or "public policy" considerations involving "non-parties" who are subject to the same arbitration agreement as the Concepcions, ignores the basic fact that legislatures – state and federal – provide private rights of action not merely to ensure compensation of particular victims, but also to aid in the enforcement of the law and deter wrongful conduct. Petitioner and its *amici* may believe that class actions are unnecessary for deterrence because of criminal sanctions, civil enforcement by state and federal law enforcement authorities, or regulatory action. But the legislatures that created the private rights of action have determined otherwise. *See* Nagareda at 1903-04 ("The existence of complementary avenues for public enforcement is . . . beside the point . . . if the problem consists of the effective

amendment of public law by way of arbitration clauses."); *Kristian*, 446 F.3d at 59 ("When Congress enacts a statute that provides for both private and administrative enforcement actions, Congress envisions a role for both types of enforcement. . . . Weakening one of those enforcement mechanisms seems inconsistent with the Congressional scheme."); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."). Private enforcement in general, and class actions in particular, are central to the enforcement schemes of many statutes. The antitrust laws are a good example.

A. Class Actions Are Critical to the Enforcement of the Antitrust Laws

This Court has often emphasized the importance of private actions to the enforcement of the antitrust laws. *See, e.g., California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Mitsubishi Motors*, 473 U.S. at 635 ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws").

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *see also Perma Life Mufflers Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").

This Court has repeatedly referred to the private litigant's role in antitrust as that of a "private attorney general." *See, e.g., Mitsubishi Motors*, 473 U.S. at 635 ("The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.") (internal quotation marks omitted); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (Clayton Act "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"); *see also Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 542 (1983); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

Relative importance of private and public enforcement. Private actions are the dominant means by which antitrust violations are remedied and deterred. In *Reiter*, this Court noted "private

suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). In the late 70's, when the Court decided *Reiter*, "nearly 20 times as many private antitrust actions [were] pending in the federal courts as actions filed by the Department of Justice." *Id.* Today, the number of private antitrust cases brought in federal court exceeds the number of U.S. government actions (civil and criminal) by more than 25 to 1. Although the number of private actions has declined significantly since 1978, the number of government actions has fallen even more sharply (in percentage terms). *See* American Antitrust Institute, *The Next Antitrust Agenda* 222, 228 (Albert A. Foer ed. 2008).

Enforcement by "private attorneys general" serves an important role in Congress' overall enforcement scheme, sometimes as a complement to government enforcement (in "follow on" actions), sometimes as a substitute. A 2008 study analyzing 40 of some of the largest successful private antitrust cases since 1990 found that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from 15 cases that did not follow government actions. *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879, 891,

897 (2008).[5] Another six of the 40 cases involved "mixed" public/private origin, which netted recoveries of $4.2 billion, and another nine provided relief significantly broader in scope than the government enforcement action. *See id.* at 897-98, 909-10. Sometimes, it was the government that "piggybacked" on private actions. *See, e.g., In re Visa Check/ Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 n.31 (E.D.N.Y. 2003) (explaining that the Department of Justice filed a lawsuit based in part on information provided by class counsel); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 226 (D.D.C. 2005) (noting that class action counsel uncovered the illegal activity of vitamin manufacturers across the globe and shared the information with the Department of Justice "enabling the criminal investigation to begin"). Notably, the total amount of criminal fines obtained by the government during the same period for all prosecutions ($4.2 billion) was less than one quarter of the private recoveries in the 40 cases studied. *See* Lande & Davis at 893.[6]

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[5] The study does not purport to be a comprehensive account of all antitrust settlements or actions during the period. *See* Lande & Davis at 889. Research for the study was funded by AAI. *See id.* at 879.

[6] The vitamins cartel "case" is instructive. That cartel resulted in criminal fines of about $900 million, the largest in U.S. history, and private recoveries of $3.9 to $5.2 billion. *See* John M. Connor, *The Great Global Vitamins Conspiracies, 1985-1999* at 131 (Apr. 9, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120936. Yet, despite the enormous sanctions, the combined criminal and private recoveries amounted to less

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In many instances, private enforcement is the only available means to redress an antitrust violation. As Professors Lande and Davis explain:

> As a practical matter, the government cannot be expected to do all or even most of the necessary enforcement for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.

Id. at 906; *see also* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 690-91 (1982) (President Reagan's antitrust chief explaining that private litigants with specialized knowledge "may have a comparative advantage over the Division in the cost of and efficiency in prosecuting a given case").

Role of class actions. It is widely recognized that class actions play a particularly important role in ensuring that the private damages remedy serves its intended function of deterring antitrust violations

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than 80% of the cartel overcharges in real terms. *See id.* at 139-40.

and compensating victims. As the bipartisan Antitrust Modernization Commission concluded, "The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs." Antitrust Modernization Commission, *Report and Recommendations* 241 (2007). This Court also has emphasized the important role that class actions play in enforcing the federal antitrust laws. *See Hawaii v. Standard Oil*, 405 U.S. at 266 ("[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *Reiter*, 442 U.S. at 343 n.6 ("the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23"); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions. . . . Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions. . . .").

Cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble-damages remedy without class actions because individual treble-damages actions by customers are not common, and are unheard of in the

case of consumers. For example, in the Lande and Davis study, only six of the 40 successful cases did not involve class actions, *see* Lande & Davis at 901, and those were suits by competitors, *see id.* at 899. Private antitrust actions are extremely expensive to pursue either in court *or in arbitration* because they involve "complicated question[s] of fact" and the application of "equally complex" law to those facts. *Kristian,* 446 F.3d at 58. Attorney's fees and expert witness fees, even in garden-variety price-fixing cases, typically will be in the millions of dollars. *See, e.g., In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 409-10 (D.N.J. 2006) (fees and expenses exceeded $6 million in case that settled before class certification; approximately $400 million of purchases at issue). Even when some of the defendants have pled guilty to criminal price-fixing charges, pursuing a private damages action can "be quite onerous, expensive, and time-consuming," *id.* at 399, because liability against other defendants may not be easy to prove, the statute of limitations (and the period of liability) will frequently be at issue, and it is costly to prove damages, not to mention defend against the inevitable motions to exclude expert witnesses and other motions that defendants file.

Negative-Value Cases. Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative-value cases, *i.e.*, cases "in which the stakes to each member are too slight to repay the cost of the suit." Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions* § 4:33, at 290

(4th ed. 2002). "Economic reality dictates" that such actions "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

The existence of a negative-value suit is often said to be the "most compelling rationale for finding superiority in a class action." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998); *see also Shutts*, 472 U.S. at 809 ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."); *Roper*, 445 U.S. at 338 (class action "may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise," thereby "vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost").

That prevailing plaintiffs' attorney's fees are recoverable under the Clayton Act does not ordinarily make individual actions (in arbitration or court) practical because expert witness expenses are effectively

not recoverable, *see American Express*, 554 F.3d at 318, and the recovery of attorney's fees does not compensate attorneys for the risk of not prevailing, *see Kristian*, 446 F. at 59 n.21 ("being made whole is hardly a sufficient incentive for an attorney to invest" in an uncertain case on a contingent basis); *City of Burlington v. Dague*, 505 U.S. 557 (1992) (under common fee-shifting statutes, lodestar may not be adjusted upward to reflect the fact that attorneys were retained on a contingent-fee basis).

B. Class Actions Are Critical to the Enforcement of the California Unfair and Deceptive Practices Statutes

While a canonical example, the Sherman Act is hardly the only statute that affords generous private remedies to serve the public interest in deterring unlawful conduct and that relies heavily on class actions to serve that end. The statutes at issue in this case, California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*, do as well. As the California Supreme Court has noted,

> Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. [They] make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private

> enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718, 724-25 (Cal. 2000); *see In re Tobacco II Cases*, 207 P.3d 20, 33 (Cal. 2009) (stating that Proposition 64, which added injury requirement for standing, "did not propose to curb the broad remedial purpose of the UCL or the use of class actions to effect that purpose"); *see also Broughton v. Cigna Healthplans of California*, 988 P.2d 67, 76-77 (Cal. 1999) ("the plaintiff in a CLRA damages action is playing the role of a bona fide private attorney general"); *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 711 (Cal. Ct. App. 2001) ("injunctive relief afforded by the CLRA is unique, as its purpose is not simply to correct future private injury but to remedy a public wrong").

In sum, private class actions are an important component of the enforcement schemes of many statutes, including the ones at issue in this case, and the courts below appropriately took this legislative policy into account in assessing the unconscionability of petitioner's class arbitration waiver.

IV. THE ARGUMENT THAT CLASS ACTIONS DO NOT DETER MISCONDUCT IS UNFOUNDED

Petitioner's and *amici*'s broadside attack on class actions as essentially shakedown schemes by class action lawyers is unfounded in theory and in fact. In particular, the argument that class actions do not further deterrence because they force defendants to settle "meritless" claims (*i.e.*, "blackmail" settlements) is particularly weak. For one thing, even if class actions resulted in some significant number of mistaken "convictions" (*i.e.*, settlements of meritless claims), one would need to know the number of mistaken "acquittals" (i.e., instances where courts fail to hold defendants liable for unlawful conduct) before concluding that class actions should be harder or easier to bring. "[B]oth types of error reduce deterrence. . . ." A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law, in* I *Handbook of Law and Economics* 403, 427 (A. Mitchell Polinsky & Steven Shavell eds., 2007).[7]

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[7] The Polinsky & Shavell chapter, relied on by the Chamber of Commerce (Br. 10), underscores the importance of "private enforcement of law to control undesirable behavior. . . ." Polinsky & Shavell at 405. They note that "allowing private suits for harm . . . motivate[s] victims to initiate legal action and thus . . . harness the information they have for purposes of law enforcement," *id.* at 406, "private parties sometimes play a complementary role by supplying information to enforcement authorities and by bringing private suits," *id.* n.3, and that private suits

(Continued on following page)

More significantly, the suggestion that businesses routinely settle "meritless" class actions with substantial payments is a myth. "Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions." Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 159 (2006); *see id.* at 158 ("Class action practice in the real world is characterized by a very high incidence of successful motions to dismiss, successful motions for summary judgment, and unsuccessful motions for class certification."); *see also* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1393 (2003) ("Dispositive motions make it hard for plaintiffs to use the threat of endless litigation to obtain payments on unmeritorious claims."); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. Rev. 65, 70 n.12 (1996) ("In real litigation . . . defendants' counsel are generally quite adept at placing time-consuming and expensive motions and other obstacles in the path of plaintiffs' counsel . . . such that it seems unlikely a plaintiff can create a sufficient threat, based on disparity of litigation cost alone, to coerce a settlement."). *But see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006) (describing congressional findings of abuse

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"constitute a substitute, at least to some extent, for public enforcement," *id.* at 450.

of securities class actions prior to enactment of securities litigation reform legislation in 1995 and 1998).

Insofar as a class action with $100 million in damages and a 10% likelihood of success settles for $10 million (*i.e.*, expected value) – the example used in the brief of the Chamber of Commerce (Br. 8) – such a settlement is *efficient* and cannot be ascribed to a "meritless" suit, particularly if it comes after summary judgment has been denied. *See, e.g.*, Advisory Committee's Notes on 1993 Amendments, Fed. R. Civ. P. 11, subdivs. (b), (c) ("[I]f a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient 'evidentiary support' for purposes of Rule 11."). As petitioner's expert, Professor Nagareda, has explained, the "amplification" of a class action is not "a source for normative concern" in a settlement involving a small likelihood of success when that likelihood is based on the potential that a fact finder will resolve ambiguous facts against the defendant. *See* Nagareda at 1891.

To be sure, settlements in excess of expected value based on defendant's risk aversion are arguably problematic, but there is little reason to believe that defendants are more risk averse than plaintiffs, and good reason to believe the contrary. *See* Silver at 1408-15. Class settlements based on a multiplication of statutory damages also could potentially be problematic when those damages are unmoored to any actual damages. *See* Nagareda at 1885-88 (discussing minimum statutory damages); *see also Shady Grove*

Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting). But even then, the normative concern would depend on whether aggregation "works a distortion of underlying substantive law." Nagareda at 1896.

In any event, there is no reliable empirical evidence that settlements of meritless class actions are common. In antitrust, for example, when the Antitrust Modernization Commission recently studied whether the antitrust laws should be modernized and considered the claims of some critics that the range of available remedies under the antitrust laws resulted in excessive payments by defendants, it reported that "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission. . . ." *AMC Report* at 247; *see also* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 103 (2010) ("claims of excessive costs, abuse, and frivolousness in litigation may have much less substance than many think, and extortionate settlements may be but another urban legend"); Silver at 1395 n.164 ("[t]here is little empirical evidence supporting the theory that frivolous lawsuits are common").

Indeed, petitioner's *amici* contradict their complaints about the burden of meritless class action settlements by attacking class actions as insufficiently protective of consumers, pointing out the significant hurdles to obtaining class certification, *see, e.g.*, Chamber of Comm. Br. 17 ("only 20% of putative classes are certified" because of rigorous

class certification standards), and that plaintiffs' counsel sometimes settle strong cases for *too little*, *see id.* at 19 ("Class counsel and defendants each have an incentive to settle on terms that may be unfavorable to the plaintiff consumers but reap large fees to counsel."). The Class Action Fairness Act of 2005 was specifically designed to protect consumers from such problematic settlements and to remedy other perceived abuses, but overall Congress found that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action. . . ." Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005), *as reprinted in* 28 U.S.C. § 1711 note.

The notion that class action lawyers are the primary beneficiaries of class actions does not withstand scrutiny. For example, the Fitzpatrick study cited by the Center for Class Action Fairness shows that in 2006 and 2007, class action settlements in federal court recovered nearly $33 billion in monetary relief, of which roughly $5 billion, or about 15%, was awarded to class action lawyers. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empir. Leg. Stud. (forthcoming 2010), *available at* http://ssrn.com/abstract=1442108; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empir. Leg. Stud. 248, 262, 265 (2010) (comprehensive study of

class action settlements showing that mean fee was 23 percent of class award, with lawyers receiving a smaller proportion as the size of the recovery increased, *e.g.*, a mean fee of 12% for recoveries exceeding $175.5 million). Lande and Davis reported that the 34 antitrust class actions in their study recovered a total of about $14-15 billion for businesses and consumers, before deducting attorney's fees. *See* Lande & Davis at 899, 901 (sum of direct and indirect purchasers' recoveries). And that did not include the monetary value of any injunctive relief, which in some instances dwarfed the compensatory relief. *See id.* at 891, 901-02; *e.g.*, *Visa Check/ Mastermoney*, 297 F. Supp. 2d at 511-12 (noting "injunctive relief will result in future savings to the Class valued from approximately $25 to $87 billion or more," while compensatory relief was $3.38 billion). In the 30 cases where the information was available, attorney's fees (and expenses) constituted approximately 14.5% ($1.4 billion) of the cash recoveries in those cases ($9.7 billion). *See* Lande & Davis at 902-03 & n.95, 911-12 (noting that percentage of recovery declined as recovery increased).

There are surely occasional abuses by class action lawyers, just as there are sometimes abuses by defense lawyers. *See* Miller at 66 ("[T]he defense bar and its clients are not always innocent victims of frivolous litigation or abusive conduct; indeed defense attorneys [may] protract pretrial processes . . . to coerce contingent-fee lawyers . . . into settlement"). However, there is simply no basis for the claim that

businesses routinely settle meritless class actions or that such settlements undercut the deterrent value of class actions generally.

CONCLUSION

For the foregoing reasons, and those set forth in respondents' brief, the judgment of the court of appeals should be affirmed.

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October 6, 2010

AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions. AAJ is committed to the ideal of access to justice for the redress of grievances. It is concerned that the theory of preemption advanced by Petitioners and its *amici* would unjustifiably curtail state authority over contract law of general application, to the detriment of consumers.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has *never* held that a facially neutral state law that is non-discriminatory in purpose and effect may somehow nonetheless be impliedly preempted by the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA").[2] And for good reason. Congress enacted the FAA with the limited purpose of

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[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

[2] "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). It may, however, pre-empt state laws "to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

remedying the common law's intentional disparate treatment of arbitration. Section 2 of the Act realizes this aim through what is essentially an equal protection clause for arbitration requiring that "state laws hostile to arbitration" be invalidated. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). Section 2 exempts from preemption state actions based on "grounds [that] exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A state judicial decision that does not treat arbitration "in a manner different from that in which it otherwise construes nonarbitration agreements," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), or "singl[es] out arbitration provisions for suspect status," *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), is not discriminatory, and thus is not preempted by § 2.

Yet, in this case, Petitioner AT&T Mobility, LLC ("AT&T") asks this Court to depart from that settled understanding and conclude that a rule of California contract law, pursuant to which a class waiver in its arbitration agreement was found to be unconscionable, is preempted—even though the state law would prohibit a class waiver from being enforced in arbitration, *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), or court, *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001). AT&T ignores clear California precedent indicating that, but for its having drafted an arbitration clause dictating that the clause would "blow up" if its class action ban were unenforceable, California courts would have granted specific performance of the contractual agreement to arbitrate. The only thing California courts did not enforce was a ban on class actions.

AT&T contends that "even if nominally neutral," California law "predictably and inevitably will have a far greater impact on arbitration agreements" than on non-arbitration agreements. Pet. Br. 30. The reason the law may impact arbitration agreements barring class adjudication more often than non-arbitration agreements is that, pursuant to industry practice of including an arbitration clause in each cell phone contract of adhesion, there are few, if any, contractual disputes about the validity of the clause in litigation. The impact AT&T identifies does not, however, qualify as actionable discrimination under § 2.

ARGUMENT

I. Congress Enacted the FAA to Eradicate the Common Law's Purposeful Discrimination Against Arbitration, and to Place Arbitration on Equal Footing With Litigation.

There is a long, and well-documented, history of courts purposefully discriminating against arbitration and favoring litigation as a means of dispute resolution. *See Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 270 (1995); *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1009-10 (S.D.N.Y. 1915) (noting that courts had adopted the "singular view of juridical sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the court"). One account of the origins of this discrimination states that compensation for English judges was tied to the number of cases they heard, and allowing another form of dispute resolution to blossom would likely have led to less

work and less pay. *See Scott v. Avery*, 5 H.L. Cas. 811 (1856) (Campbell, L.J.); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 Colum. L. Rev. 35, 44, 49 (1983); *but see Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 984 & n.16 (2d Cir. 1942) (stating that although "able historians have stressed this pecuniary motive as an important factor in the struggles for jurisdiction between the several English court," it may be "unjustified"). Another, more charitable account is that courts believed that it was against public policy to enforce pre-dispute arbitration agreements. *Kulukundis Shipping Co.*, 126 F.2d at 983.

Whatever the motivation, courts protected their role in dispensing justice and unfavorably treated arbitration as a second-class means of dispute resolution. The common-law rule against specific enforcement of arbitration agreements arose to render such agreements unenforceable so long as the non-breaching party revoked his or her promise to arbitrate prior to an award of damages. Although a non breaching party could obtain damages for the breach, such damages typically were nominal. *See* 1 Ian R. Macneil, *et al.*, *Federal Arbitration Law* § 4.3.2.2, at 4:18 (Little, Brown 1999). The doctrine's application to bar specific performance of pre-dispute arbitration agreements—but not post-dispute arbitration agreements or arbitral awards, both of which also ousted the courts of jurisdiction—was said to evidence "judicial jealousy rather than judicial reasoning." *Park Constr. Co. v. Indep. Sch. Dist. No. 32, Carver County*, 296 N.W. 475, 477 (Minn. 1941)

Courts employed other means to disadvantage arbitration. For example, they would not stay a legal action pending a determination of arbitrability. *See Hurst v. Litchfield*, 12 Tiffany 377, 379 (N.Y. 1868). Nor would courts permit a pre-dispute arbitration agreement to operate as a complete bar to an action at law. *See U.S. Asphalt Ref. Co.*, 222 F. at 1010.

As this Court has observed, "American courts initially followed English practice, perhaps just stand[ing] . . . upon the antiquity of the rule prohibiting arbitration clause enforcement, rather than upon its excellence or reason." *Allied-Bruce*, 513 U.S. at 270 (alteration in original; quotation marks omitted). But the English practice was not without its American detractors. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924) (recognizing that American courts had "frequently criticised the rule [against specific enforcement] and recognized its illogical nature and the injustice which results from it").

Congress responded in 1925 by enacting the FAA. The Act, "first and foremost," seeks to end the prevalence of "antiarbitration rule[s]" in American law, *Allied-Bruce*, 513 U.S. at 270-71 (citation omitted), such as the common-law rule against specific performance of arbitration agreements, *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) (citing S. Rep. No. 536, 68th Cong., 1st Sess., 2-3 (1924)); and it seeks to place agreements to arbitrate and other contracts on equal footing, *see Volt Info. Scis, Inc.*, 489 U.S. at 474; *accord Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

Section 2, the FAA's "centerpiece," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), embodies this non-discrimination principle and is best understood as an equal protection clause for arbitration. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1955 & n.171 (2003). It requires that an arbitration agreement "be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, "States may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce*, 513 U.S. at 281.

II. State Laws That Purposefully Discriminate Against Arbitration Are Preempted.

Consistent with this anti-discrimination principle, the Court has repeatedly held that state laws that discriminate against arbitration are preempted. It has otherwise *never* held that § 2 preempts a facially neutral state law that is non-discriminatory in purpose and effect.

Thus, for instance, in *Perry*, 482 U.S. at 484, this Court held that § 2 preempts a state law exempting wage-and-hour claims from "any private agreement to arbitrate." Invoking the FAA's non-discrimination paradigm, it explained that state law may neither treat an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements," nor "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding." *Id.* at 492 n.9.

In *Southland Corp.*, 465 U.S. at 16, the Court held that § 2 preempted a provision of California Franchise Investment Law requiring judicial consideration of claims brought under the statute and precluding enforceability of a contract to arbitrate. The law at issue did not apply to contracts generally but purposefully singled out the arbitral process for disfavor by seeking to lodge exclusive jurisdiction in the courts over claims asserted under the Franchise Investment Law. *See id.* at 5; *see also Preston v. Ferrer*, 552 U.S. 346, 356, 358 (2008) (reaffirming that state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA).

In *Casarotto*, 517 U.S. at 681, the Court concluded that § 2 preempted a state law requiring that, absent a conspicuous notice of an arbitration clause on the first page of the contract, the contract was not arbitrable. Borrowing language from equal protection doctrine, the Court reasoned that States could not, consistent with § 2, "singl[e] out arbitration provisions for suspect status." *Id.* at 687.

Lastly, in *Allied-Bruce*, 513 U.S. at 269, the Court invalidated a state law "making written, predispute arbitration agreements" unenforceable, because the state law exhibited the type of "judicial hostility to arbitration agreements" that § 2 prohibits. *Id.* at 272.

III. California Law Does Not Purposefully Discriminate Against Arbitration and Thus Is Not Preempted.

This Court should hold, in view of § 2's "fundamental nondiscrimination principle," Pet. Br.

28, and the presumption against preemption, *see Southland Corp.*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part), that the FAA does not preempt California unconscionability law insofar as it declares unenforceable the class waiver in the arbitration agreement at issue here. That California law would invalidate a class waiver in arbitral (*Discover Bank*, 113 P.3d at 1110) *and* judicial forums (*America Online*, 108 Cal. Rptr. 2d 699) demonstrates conclusively that the state law does not discriminate against arbitration in the sense contemplated by § 2.[3] "The arbitration clause [at issue here] is irrelevant to the unconscionability" of the class waiver. *See Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) (holding that FAA does not preempt Washington law deeming unenforceable certain class waivers in arbitration contracts). Instead, the state-law rule of unconscionability is concerned with "the vindication of substantive rights." *Discover Bank*, 113 P.3d at 1109. For these reasons, California law does not "singl[e] out arbitration provisions for suspect status," *Casarotto*, 517 U.S. at 687; nor does it treat

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[3] California law does not purposefully discriminate against arbitration, the standard under equal protection doctrine, *see Washington v. Davis*, 426 U.S. 229 (1976), to which Section 2 preemption doctrine is best analogized; nor is its impact discriminatory in the sense contemplated by civil rights laws, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Not "all class action waivers are necessarily unconscionable" under California law. *Discover Bank*, 113 P.3d at 1110. In fact, courts applying California law have found class-action bans not to be exculpatory in certain contexts. *E.g., Walnut Producers of Calif. v. Diamond Foods, Inc.*, 114 Cal. Rptr. 3d 449, 460-62 (Cal. Ct. App. 2010); *Dale v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1027 (E.D. Cal. 2009). The reasons why AT&T's class-action ban is exculpatory are set forth in Respondents' Brief at 3-4, 39-44.

AT&T's arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements," *Perry*, 482 U.S. at 492 n.9; and thus it is not preempted. In fact, in this case, the only reason the unconscionable class ban was not severed and the parties were not ordered to arbitrate is the agreement contains a "blowup clause." *See* App. 61a (requiring that in the event the class waiver is found to be unenforceable, the entire arbitration provision "shall be null and void"); *see, e.g., Indep. Ass'n of Mailbox Center Owners, Inc. v. Superior Court*, 34 Cal. Rptr. 3d 659, 676 (Cal. Ct. App. 2005) (severing unconscionable class ban and compelling arbitration under the remaining contract).

In response, AT&T contends that "even if nominally neutral," California law "predictably and inevitably will have a far greater impact on arbitration agreements" than on non-arbitration agreements. Pet. Br. 30. The law may impact arbitration agreements barring class adjudication more often than non arbitration agreements because the industry's practice is to include an arbitration clause in each cell phone contract of adhesion. That impact, however, does not qualify as actionable discrimination under § 2.

What is more, it would be improper to credit such an impact in determining whether the state law applies to "any contract" in the sense contemplated by § 2. Were that a relevant consideration, an industry could easily avoid compliance with facially neutral state laws lacking a discriminatory purpose or effect by banding together and adding an arbitration clause to all contracts and then claiming such state laws apply more often to arbitration

contracts than any other type of contract. Section 2 would then, in effect, "make arbitration agreements [not] as enforceable as other contracts, but [] more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). That was not what Congress intended when it preserved state-law grounds for revocation applicable to "any contract." Instead, it intended to place agreements enforceable in arbitration or courts on equal footing. California law is neutral in this regard and thus is not preempted.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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October 6, 2010

AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT & T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTRODUCTION

Amici Curiae American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Consumer Bankers Association ("CBA"), Financial Services Roundtable and California Bankers Association ("CABA") (together, "*Amici*") respectfully submit this brief in support of Petitioner AT & T Mobility LLC ("ATTM"). All counsel of record provided blanket consent to the filing of *amici* briefs in this case.[1]

AMICI'S INTEREST IN THIS CASE

The ABA is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional and money center banks. The ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority – approximately 95% – of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation, either as a party or *amicus curiae*, in order to protect and promote the interests of the banking industry and its members.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services

[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici* and their members made a monetary contribution intended to fund the preparation or submission of the brief.

firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years. The association's officers, board and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue and 2.3 million jobs.

The CABA is a non-profit trade association established in 1891. The CABA represents most depository institutions that operate in the State of California.

Many of *Amici*'s members, constituent organizations and affiliates (collectively, "Members") have independently adopted as standard features of their consumer contracts provisions that call for individual arbitration of disputes arising from or relating to those contracts, upon the election of either party. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes and because arbitration minimizes the disruption and loss of good will that often results from litigation.

Amici's Members strive diligently to ensure that their arbitration agreements provide a fair, efficient and cost-effective means for both Members and their customers to resolve disputes between them. The core mandate of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1, *et seq.*, is to enforce private arbitration agreements according to their terms. The Panel below, however, erroneously concluded that the FAA should yield to the policy of the California courts that agreements providing for individual arbitration can be invalidated as "unconscionable" under state law simply because, in the view of the California courts, the unavailability of class action procedures will result in insufficient deterrence of violations of the law.

The Panel's decision, if allowed to stand, will invalidate the overwhelming majority of arbitration agreements, which provide for individual arbitration and disallow class proceedings. This subverts the practical value of arbitration and the policy of the FAA to resolve disputes swiftly and inexpensively in

accordance with private arbitration agreements. Thus, *Amici* and their Members have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has recognized narrow grounds for invalidating an arbitration agreement; such agreements "may be invalidated by '*generally applicable contract defenses*, such as fraud, duress, or unconscionability.'" *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (emphasis added) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). The arbitration agreement in the present case clearly does not meet this description since the California policy favoring classwide resolution of claims is not a "generally applicable contract defense" and, thus, does not provide a basis for the revocation of "any contract." Accordingly, under the plain language of FAA § 2, the policy relied upon by the Panel in reaching its decision cannot be used as a legal basis to invalidate AT&TM's arbitration agreement.

Moreover, a contractual provision barring classwide arbitration should not automatically vitiate an arbitration agreement. This Court has instructed that the unavailability of class procedures does not justify invalidation of an arbitration agreement unless Congress itself has evinced an intention to prohibit an agreement that provides exclusively for individual arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (construing arbitration clause in the context of a claim under the

federal Age Discrimination in Employment Act (the "ADEA"). Likewise, just last Term, this Court held in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), that courts and arbitrators may not impose their own policies favoring class actions on parties that had not contracted for class-wide arbitration. The Ninth Circuit's departure from this Court's precedents independently justifies reversal of the decision below.

While the plain language of Section 2 of the FAA and this Court's decisions in *Gilmer* and *Stolt-Nielsen* should resolve this case, the Ninth Circuit's policy reasoning fails on its own terms. The Ninth Circuit, following the lead of the California state courts, gave insufficient weight to the benefits of arbitration and the costs and problems associated with class actions. Regarding the notion that violations of the law are insufficiently deterred in the absence of a potential class action remedy, the Panel failed to recognize the existence of a comprehensive system of regulatory oversight and an impressive array of potential administrative and legal sanctions designed to ensure compliance with the law.

Accordingly, this Court should reverse the decision below and hold that the FAA preempts States from conditioning the enforcement of an arbitration agreement on the availability of class arbitration when, as here, class arbitration is not necessary to ensure vindication of the parties' substantive rights.

ARGUMENT

I. California Policy Favoring Class Actions Does Not Constitute a Ground for the "Revocation of Any Contract," as Required Under the Plain Language of Section 2 of the FAA to Justify Invalidation of ATTM's Arbitration Agreement.

The law recognizes a strong interest in the enforceability of contracts in accordance with their terms. *See Sander v. Alexander Richardson Investments*, 334 F.3d 712, 721 (8th Cir. 2003) ("Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract."). Prior to the adoption of the FAA, this public policy was circumvented with respect to arbitration agreements by state and federal courts alike, which refused to enforce such agreements. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009).

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288 (2002) (quoting *Gilmer*, 500 U.S. at 24). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983). Accordingly, Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. FAA Section 2 creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). It "command[s] that an arbitration agreement

is enforceable just as any other contract . . . ." *Vaden*, 129 S. Ct. at 1275.

Pursuant to Section 2, this Court has recognized a narrow class of cases where arbitration agreements will not be enforced. Like other contracts, arbitration agreements "may be invalidated by *'generally applicable contract defenses*, such as fraud, duress, or unconscionability.'" *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (emphasis added) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

While generally applicable contract defenses can justify a refusal to enforce an arbitration agreement in proper circumstances, this Court has never suggested that an arbitration agreement can be held invalid based on a state policy that does not apply to all contracts. Yet several California courts and the Panel below have done just that by attaching the label of "unconscionable" to all arbitration agreements that conflict with the state's policy favoring class actions. These decisions run directly afoul of the plain language of Sections 2 and 4 of the FAA and turn the Supremacy Clause on its head.

An attack on the substance of an arbitration agreement, as opposed to an attack on whether the agreement was properly formed, necessarily addresses only a narrow class of contract (in this case, a consumer agreement involving small amounts of money and a class action waiver) and *not* "any" contract. Thus, as the Third Circuit recognized in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), when properly understood the FAA only permits a court to deny a motion to compel arbitration because of defects in contract formation (*e.g.*, procedural unconscionability or fraud in the factum), not on

public policy or substantive unconscionability grounds. *See id.* at 395 (plaintiff's unconscionability defense was preempted by the FAA where it was "not predicated on a contention that [defendant] misled [plaintiff] as to the [contract's] terms or forced her by some unlawful coercion to enter into it and accept the arbitration provision," but rather on "what [the provision] provides, i.e., arbitration of disputes on an individual basis in place of [class] litigation . . . .").

A contrary result would conflict with the "'primary' purpose of the FAA . . . to ensure that 'private agreements to arbitrate are enforced according to their terms,'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (citations omitted), and simultaneously create unnecessary tension between Sections 2 and 4 of the FAA. While Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, Section 4 of the FAA provides more broadly that arbitration agreements must be enforced "in accordance with the terms of the agreement." 9 U.S.C. § 4. These slightly different formulations can be harmonized only if Section 2's "revocation" savings clause is read to carve out only a narrow, *procedural* exception to Section 4, since otherwise, as in the present case, the exception to arbitration could swallow the rule. As stated in *Allied-Bruce Terminix Cos. v. Dobson*:

> [Section] 2 [of the FAA] gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law

> or in equity for the revocation of any contract." *What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful* . . . .

513 U.S. 265, 281 (1995) (citations omitted) (emphasis added). *See also National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) ("Congress created an exception to the general rule [that an arbitration clause will be enforced according to its terms] only when there is a flaw in the *formation* of the agreement to arbitrate") (emphasis added).

Manifestly, the particularized arbitration "unconscionability" principles developed by California state courts and applied by the Panel below represent a naked policy preference favoring class actions over individual arbitration – *not* the application of universal contract formation principles. Accordingly, the decision below should be reversed.

II. ATTM's Arbitration Agreement Is Enforceable Under the Standards Established by This Court.

In *Gilmer*, this Court addressed whether to require individual arbitration of a claim under the ADEA, even though the ADEA expressly authorizes class claims. It held that, under the FAA, arbitration agreements must be enforced "in the manner provided for in [the arbitration] agreement," 9 U.S.C. § 4, unless "'Congress itself has evinced an intention to preclude'" such arbitration. 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). This is true "even if

the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32.

Consistent with *Gilmer*, most federal courts of appeals have regularly enforced arbitration agreements with class action waivers.[2] In contrast, the Ninth Circuit, applying California law, has routinely refused to enforce agreements providing for individual arbitration.[3] A small number of other circuit

[2] *See, e.g.*, *Gay*, *supra* (enforcing individual arbitration of a $39.92 claim under the Federal Credit Repair Organizations Act and the Pennsylvania Credit Services Act as a matter of Pennsylvania and Virginia law and stating that a contrary result would be preempted by the FAA); *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2007) (enforcing class action waiver and compelling arbitration of federal antitrust claims); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (enforcing class action waiver under Louisiana law and suggesting that the FAA would preempt state law if it invalidated the class action waiver); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002) (suggesting that there is no non-waivable right to maintain a class action under the federal Truth in Lending Act ("TILA"), RICO or Kentucky law); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003) (enforcing a class action waiver based on the FAA principle that arbitration agreements must be enforced in accordance with their terms); *In re Piper Funds, Inc.*, 71 F.3d 298, 303 (8th Cir. 1995) (stating that a party's "contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management"); *Caley v. Gulfstream Aerospace Corporation*, 428 F.3d 1359 (11th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (finding a class action waiver not unconscionable under Georgia law and suggesting that the FAA would preempt state law if it invalidated class action waivers).

[3] *See, e.g.*, *Olmstead v. Dell, Inc.*, No. 08-16479, 2010 WL 396089 (9th Cir. Feb. 5, 2010) (refusing to enforce Texas choice of law clause and holding class action waiver unlawful under

decisions also have rejected individual arbitration of federal claims, in all cases based on the perception that the plaintiff would not have been able to vindicate his or her rights in an individual arbitration because of, for instance, the complexity of proof in the case or the perceived negative value of the claim. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (antitrust case involving perceived negative value claim); *In re American Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009) (same), *petition for writ of certiorari granted, judgment vacated and case remanded for further consideration in light of Stolt-Nielsen*, 130 S. Ct. 2401 (2010);[4] *Fensterstock v. Education Finance Partners*, 09-1562-CV, 2010 U.S. App. LEXIS 14172 (2d Cir. July 12, 2010) (small claims); *Litman v. Cellco P'ship*, No. 08-4103, 2010 U.S. App. LEXIS 10405 (3d Cir. May 21, 2010) (same); *Homa v. American Express Company*, 558 F.3d 225 (3d Cir.

California law); *Oestreicher v. Alienware Corporation*, No. 07-16531, 2009 WL 902341 (9th Cir. April 2, 2009) (refusing to enforce Florida choice of law clause and holding class action waiver unlawful under California law in the context of a $4,000 claim for a defective computer); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007) (holding class action waiver unconscionable under California law and refusing to find FAA preemption).

[4] Most of the *Amici* in this case also participated as *amici* in support of the successful *certiorari* petition filed by American Express in *Merchants' Litigation*. In that brief, *amici* demonstrated that the Second Circuit departed from *Gilmer* and established FAA jurisprudence when it invalidated the parties' agreement without any evidence of Congressional intent to prohibit individual arbitration (and, indeed, even though Congress explicitly declined to provide for class enforcement when it passed the Sherman Act). *Amici* also showed that the Second Circuit erred in concluding that the named plaintiff had a negative value claim in an individual arbitration proceeding.

2009) (same); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007) (same). The result in each of these cases is clearly wrong under *Gilmer* because nothing in the FAA (or any of the federal statutes at issue) evidences any congressional intent to preclude agreements to arbitrate exclusively on an individualized basis.

These decisions are flatly inconsistent with this Court's recent decision in *Stolt-Nielsen*, which rejected the "negative-value claim" justification that the arbitrators adopted in that case when they erroneously allowed the claim to proceed as a class-arbitration. *See Stolt-Nielsen*, 130 S. Ct. at 1769 n.7.

This Court's recent decision in *Stolt-Nielsen* confirms that the Ninth Circuit erred in refusing to enforce AT&TM's arbitration agreement. In *Stolt-Nielsen*, the Court held that, under the terms of the parties' agreement, the arbitration had to take place on an individual basis because "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775 (emphasis in original). The Court precluded class arbitration because the parties had "reached 'no agreement' on that issue." *Id. Stolt-Nielsen* thus reaffirmed the FAA's "fundamental" principle that "'arbitration is a matter of consent, not coercion,'" *id.* at 1782 (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), and that parties are therefore "'free to structure their arbitration agreements as they see fit.'" *Id.* at 1763 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). The contrary rule of the California courts – which permits the abrogation of the parties' arbitration agreement

based on the courts' own perception of public policy – must yield to that fundamental principle. Indeed, the Court in *Stolt-Nielsen* expressly stated that the FAA requires courts and arbitrators "to interpret and enforce a contract, not to make public policy." *Id.* at 1767. Here, likewise, the Ninth Circuit erred in giving precedence to California's public policy judgments over the agreement of the parties. Accordingly, the decision below should be reversed under the principles established in *Gilmer* and *Stolt-Nielsen*.

III. California Courts and the Ninth Circuit Have Given Insufficient Weight to the Benefits of Arbitration and the Costs and Problems Associated with Class Actions.

The Panel decision failed to accord sufficient weight to the benefits of arbitration and the disadvantages of class proceedings. "The advantages of arbitration are many: It is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep. No. 97-542, at 3 (1982). These "advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). In the instant case, the District Court concluded that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." Cert. Pet. at 42a.

The benefits of arbitration are not limited to parties who have disputes. Rather, *all* contracting

parties benefit from the lower dispute resolution costs inherent in arbitration. This is because economic considerations encourage companies to pass on to their customers, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91-93.

Moreover, published studies show significant additional benefits to arbitration, as well as high levels of satisfaction for parties who participate in arbitration. *See, e.g.*, Harris Interactive, *Arbitration: Simpler, Cheaper and Faster Than Litigation*, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (Apr. 2005) (strong satisfaction with arbitration results and process, including speed and simplicity); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998) (director of ACLU's National Task Force on Civil Liberties in the Workplace concludes that employees collectively receive *10.4%* of their demand in litigation, compared with *18%* in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history").

On March 12, 2009, the Searle Civil Justice Institute of Northwestern University School of Law released the first in-depth study of consumer arbitrations administered by the AAA. *See Consumer Arbitration Before the American Arbitration Association Preliminary Report, available at* http://www.searlearbitration.org /report. The study, which was based on a review of 301 consumer arbitrations that were closed by award between April and December

2007, reached the following conclusions: (1) The upfront cost of arbitration for consumer claimants is quite low (an average of $96 for claims less than $10,000 and $219 for claims between $10,000 and $75,000). These amounts are below the levels specified in the AAA fee schedule for low-cost arbitrations and are the result of arbitrators reallocating consumer costs to businesses. (2) AAA consumer arbitration is an expeditious way to resolve disputes (an average of 6.9 months). (3) Consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed). (4) No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business. (5) Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was $14,574. (6) A substantial majority of consumer arbitration clauses (76.6%) fully complied with the AAA Due Process Protocol. (7) AAA's review of arbitration clauses for Protocol compliance was effective (98.2% of the time) at identifying and responding to clauses with Protocol violations. (8) AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses. In 2007, AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its case load) because the business failed to comply with the Protocol. (9) As a result of AAA's Protocol compliance review, some businesses either waive problematic provisions or revise arbitration clauses to remove provisions that violate the Protocol.

A second study by the same organization, this one involving debt collection, showed that "[c]reditors prevailed less often (that is, consumers prevailed

more often) in the arbitrations studied than in court . . . even after controlling for differences among the types of cases and the venue in which they were brought" and that "[c]reditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court . . . [e]ven after controlling for differences among the cases." Searle Institute, *Creditor Claims in Arbitration and in Court Interim Report No. 1, Executive Summary* (Nov. 2009) (emphasis eliminated), *available at* http://www.law.northwestern.edu/searlecenter/uploads/CREDITOR%20CLAIMS%20IN%20ARBITRATION%20AND%20IN%20COURT%20INTERIM%20REPORT%20NO.%201.pdf.

By contrast, the existence of substantial problems with class actions cannot be disputed. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, p. 401 (RAND Institute for Civil Justice 2000) (leaving open the "great big question" whether class actions, on balance, serve the public well); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river"); *In re Gen. Motors Corp.*, 55 F.3d 768, 778 (3d Cir. 1995) (noting that class actions can become a vehicle for collusive settlements); 151 Cong. Rec. H1726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner, sponsor of Class Action Fairness Act) ("The class action judicial system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank."). Certainly, reasonable consumers could well prefer cost savings and other arbitration benefits to the speculative prospect of "relatively paltry potential recoveries" in class actions. *Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In light of the benefits that arbitration can provide, Congress has encouraged parties to arbitrate disputes in accordance with the contracts they have executed. *See* 9 U.S.C. § 2. "[T]he FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding – apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007) ("*An Uninvited Guest*") (emphasis original). In this regard, proponents of the FAA who testified before Congress described arbitration as "face to face" in nature and prompt, inexpensive and procedurally streamlined. *Id.* at 59-60.

One of the leading witnesses characterized arbitration as "something so much cheaper than litigation that . . . its use would reduce the price of consumer goods . . . ." *Id.* at 59 n.16 (citations omitted). Another leading witness advised Congress that arbitration would avoid long delays resulting from court congestion, preliminary motions and other steps taken by litigants. *Id.* at 59. Accordingly, Congressional reports recommending adoption of the FAA made clear that, "when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined – in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings." *Id.* at 61.

Where parties have contracted for individual arbitration, imposing class arbitration effects a "fundamental change" to the parties' agreement. *Stolt-Nielsen*, 130 S. Ct. at 1776. Class arbitration "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties," including absent parties. *Id.* The parties' expectations about privacy and confidentiality in individual arbitration are also "potentially frustrat[ed]" when disputes are litigated on a class-wide basis. *Id.* Perhaps most critically, class arbitration drastically raises the stakes "even though the scope of judicial review is much more limited." *Id.*

In effect, superimposing class-action procedures on arbitration "brings the burdens of litigation into the arbitral forum. . . . [T]he greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration . . . lessens the distinction between the two processes." Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. Disp. Resol. 259, 272; *accord* Linsday R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649 (class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration"). Thus, class arbitration, which attempts to combine two separate and distinct forms of dispute resolution, creates an unworkable tangle inferior to either a true judicial or arbitral forum.

Not only is class arbitration inconsistent with the streamlined procedures that are the *sine qua non* of

the individual arbitration contemplated by the FAA, but it also generates unique costs. For example, the "clause construction" determination, which addresses whether a particular agreement permits class arbitration,[5] has no counterpart in the courts. Clause construction disputes can be time-consuming and costly. *See An Uninvited Guest*, at 63-64. Thus, class arbitration creates delays and costs incompatible with the expectations of parties who bargained for individual arbitration.

The cost of class arbitration is hardly its only (or worst) disadvantage. Any class-wide arbitral award would be reviewable only for extremely limited causes, including fraud, bias or gross misbehavior of the arbitrator. *See* 9 U.S.C. § 10; *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (holding that parties may not contractually expand the grounds for appealing arbitration awards). Many companies are willing to risk an erroneous decision in an *individual* arbitration because of the cost savings inherent in arbitration and the desire to pursue a less adversarial way of resolving customer disputes. However, the calculus changes dramatically if the arbitration provision must allow for class proceedings. As one member of this Court commented in referring to class arbitration proceedings: "You might not want to put your company's entire future in the hands of one arbitrator." *See* Tr. of Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* 2003 WL 1989562, at *29. The truth of the matter is that few if any companies — and no

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[5] *See* Rule 3 of AAA Supplementary Rules for Class Arbitrations, http://www.adr.org/sp.asp?id=21936 and Rule 3 of JAMS Class Action Procedures, http://www.jamsadr.com/rules-class-action-procedures/

companies that make a considered decision – will "bet the bank" on a class arbitration.

"The arbitrator has no authority, *sua sponte*, to assert jurisdiction over a contracting party who has never appeared or agreed to an arbitration proceeding or a modification of his or her contract." Edward C. Anderson & Kirk D. Knutson, "*Class" Arbitration? What About the Rights of Absent "Class" Members?*, 7 Engage 148, 151 (2006), http://www.fed-soc.org/doclib/20080214_LitAndreson.pdf ("*Class Arbitration*"). And the lack of judicial involvement and oversight of classwide arbitration raises significant due process concerns about the protection of absent class members. *See An Uninvited Guest* at 75-78.

This Court has warned that courts should be "mindful that Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613 *citing* 28 U.S.C. § 2072(b). In enacting the FAA in 1925, well before Rule 23 was added to the Federal Rules in 1966, Congress clearly did not contemplate classwide arbitration.

For all these reasons and more, this Court held in *Stolt-Nielsen*, just a few months ago, that class procedures could not be imposed on parties who agreed to arbitration but did not address in their agreement whether the arbitration would necessarily be conducted on an individual basis. According to the Court, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775.

In short, there are good reasons for private parties to prefer individual arbitration of consumer disputes over class proceedings. Under the FAA, that choice must be respected.

IV. Class Actions Are Not Needed To Ensure High Levels of Legal Compliance.

The Panel below refused to enforce AT&TM's arbitration agreement because California courts have said that an arbitration agreement with a class action waiver is "unconscionable" when the unavailability of class procedures might lessen the pressure on companies to comply with the law. While courts in California and the Ninth Circuit insist upon preserving the deterrent effect of class proceedings at the expense of individual arbitration, a number of other courts have relied upon government enforcement mechanisms in upholding the validity of arbitration agreements with class action prohibitions. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 375-76 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) (even if class actions are not available in arbitration, numerous administrative mechanisms exist to enforce the federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA")); *accord, Gay v. CreditInform*, 511 F.3d 369, 381 (3d Cir. 2007), *reh'g denied* (Jan. 29, 2008); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818 (11th Cir. 2001). *See also Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1292 (M.D. Ala. 2003) (sustaining class action waiver in arbitration agreement in view of administrative enforcement mechanisms for ECOA violations and the federal policy favoring arbitration); *In*

re Universal Service Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1137-38 (D. Kan. 2003).[6]

In the instant case, if AT'TM (or another provider of telecommunications services) were to impose an unreasonable charge or engage in any unjust or unreasonable practice, it would be in violation of Section 201(b) of the Federal Communications Act of 1934 (the "FCA"), 47 U.S.C. § 201(b), and the Federal Communications Commission (the "FCC") would have broad authority under the FCA to: (1) investigate the provider, 47 U.S.C. § 403; (2) adjudicate complaints regarding its conduct, 47 U.S.C. § 208; (3) issue a ruling ordering it to pay damages, 47 U.S.C. § 209; and (4) assess forfeitures. 47 U.S.C. § 503.[7]

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[6] Congress has *eliminated* private actions entirely (not just class actions) under several consumer credit statutes, relying *entirely* upon the efficacy of robust administrative enforcement. *See, e.g.*, Pub. L. 104-208, Sec. 2604(a) (eliminating private actions under Truth-in-Savings Act); *Perry v. First Nat'l Bank*, 459 F.3d 816 (7th Cir. 2006) (holding that amendments to the Fair Credit Reporting Act eliminated private actions against consumer report users). And when Congress recently enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act"), Pub.L. 111-24, 123 Stat. 1734, it placed a number of the CARD Act's substantive provisions in a part of TILA that is not enforceable through private actions. See 15 U.S.C. § 1640(a) (creating private right of action for violations of *Part B* of TILA); 15 U.S.C. §§ 1665e-e (CARD Act provisions requiring reduction in interest rates in specified circumstances, limiting penalty fees and requiring consideration of the cardholder's ability to repay).

[7] The FCC has aggressively employed these powers, issuing notices of apparent liability for forfeiture or entering into consent decrees with numerous telecommunications companies that have allegedly violated laws designed to protect consumers, including laws prohibiting overcharges. *See, e.g., The Hot Lead LLC*, Forfeiture Order, 23 F.C.C.R. 5282 (2008) (FCC issued

Wireless carriers also have exposure in state enforcement proceedings. For example, the California Public Utilities Commission (the "CPUC") has authority to enforce California laws applicable to providers of wireless services by: (1) issuing orders commanding compliance with state laws, Cal. Publ. Util. Code § 702; (2) conducting investigations on its own motion or after receiving a complaint from a consumer, Cal. Publ. Util. Code § 1701; Rule 5.1 of the CPUC Rules of Practice and Procedure; (3) ordering repayment of excessive surcharges, with interest, Cal. Publ. Util. Code § 734; and (4) ordering penalties of not less than $500 nor more than $20,000 for each offense for failure to comply with an order or

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monetary forfeiture in the amount of $2,591,500 for violations of the Telephone Consumer Protection Act (the "TCPA") and FCC rules relating to unsolicited facsimile advertisements to consumers); *Horizon Telecom, Inc.*, Notice of Apparent Liability, 23 F.C.C.R. 3485 (2008) (apparent liability for forfeiture of $5,084,000 for alleged slamming violations); *Sprint Communications Company L.P.*, Order and Consent Decree, 20 F.C.C.R. 5576 (2005) (Sprint Communications Company L.P. agreed to make a voluntary contribution in the amount of $4 million to terminate slamming investigation); *Fax.com, Inc.*, Forfeiture Order, 19 F.C.C.R. 748 (2004) (FCC issued monetary forfeiture in the amount of $5,379,000 for violations of the TCPA and FCC rules relating to unsolicited facsimile advertisements to consumers); *NOS Communications, Inc. and Affinity Network Incorporated*, Order and Consent Decree, 17 F.C.C.R. 26853 (2002) (two affiliated long distance companies agreed to make a voluntary contribution in the amount of $1 million to resolve deceptive marketing practices allegations). Note that all of the cases cited in this footnote above are available at http://www.fcc.gov/eb/Orders. *See also* Edmund L. Andrews, "Settlement for Nynex and F.C.C.," N.Y. Times, Oct. 5, 1990 (reporting on a consent decree providing for refund of $35.5 million in overcharges, payment of back interest and $1.4 million contribution to the U.S. Treasury).

requirement of the CPUC, in a case in which a penalty has not otherwise been provided. Cal. Publ. Util. Code § 2107. Additionally, the California Attorney General may pursue actions against wireless carriers for restitution, civil penalties, injunctive relief and other remedies. *See, e.g.*, California Business and Professions Code § 17200, *et seq.* (prohibiting unlawful, unfair or fraudulent business practices); and § 17500, *et seq.* (prohibiting untrue or misleading advertising).

Other industries are likewise subject to the threat of regulatory enforcement proceedings. *Amici* can speak authoritatively concerning administrative remedies affecting participants in the consumer financial services industry. The industry operates within a comprehensive state and federal regulatory structure aimed at obtaining compliance with applicable state and federal requirements. Thus, even if the Ninth Circuit or the California courts were free to impose their own policy judgments under the FAA – which they are not – there is no basis for any supposition that the availability of class-wide arbitration is necessary to ensure that the financial sector remains compliant with the law.

For customers of companies that are not depository institutions supervised by the federal banking agencies, the Federal Trade Commission (the "FTC") has broad powers to redress unfair or deceptive acts and practices proscribed by Section 5 of the FTC Act, 15 U.S.C. § 45. It can bring civil proceedings to obtain: (1) a civil penalty of up to $10,000 for each violation, 15 U.S.C. § 45(m); (2) an injunction and ancillary relief, 15 U.S.C. § 53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . . [including] rescission or reformation of contracts,

the refund of money or return of property, [and] the payment of damages . . . ." 15 U.S.C. § 57b(b).

The FTC has aggressively employed its consumer protection powers. Reported cases under the FTC Act include *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991) (following *Singer* and affirming award of monetary equivalent of rescission); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (asset freeze); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997) (rescission, restitution and disgorgement).[8]

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[8] In the last week of July 2010 alone, the FTC announced a number of successful regulatory proceedings. *See* "Mortgage Relief Marketer Will Return $2.4 Million to Consumers to Settle FTC Charges" (settlement provides ban from selling mortgage relief and modification services and monetary relief); "Rite Aid Settles FTC Charges That It Failed to Protect Medical and Financial Privacy of Customers and Employees" (July 27, 2010) (FTC and HHS settlement requires Rite Aid to establish a comprehensive information security program designed to protect the security, confidentiality, and integrity of the personal information it collects from consumers and employees and obtain a security audit every two years for the next 20 years; HHS obtains $1 million of relief in related action); "Deceptive Marketers Banned from Selling Mortgage Relief Services; One Defendant Ordered to Pay $11.5 Million" (July 26, 2010) (settlement provides ban from selling mortgage relief and modification services and monetary relief). *See also* "Court Halts Bogus Invention Promotion Claims" (Apr. 19, 2006) (judgment to pay $26 million in consumer redress and permanent bar from deceptive recruiting practices); "ChoicePoint Settles Data Security Breach Charges; to Pay $10 Million in Civil Penalties, $5

The federal banking agencies have even stronger remedies available to them in the event a depository institution violates the law. Under Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818, the appropriate agency may initiate cease and desist proceedings and obtain an order that requires the offending institution, among other things, to: (1) cease and desist the unlawful conduct; (2) make restitution or provide reimbursement against loss in the case of unjust enrichment or reckless disregard for the law; (3) rescind the underlying agreement; or (4) take such other action as the agency determines to be appropriate. 12 U.S.C. § 1818(b). In addition, the agency can remove from office any institution-affiliated party who has directly or indirectly violated the law and can prohibit such person from further participating in the affairs of *any* insured depository institution. 12 U.S.C. §§ 1813(u), 1818(e). The agency can also obtain sizable civil money penalties, up to $25,000 or $1 million per day in specified cases. 12 U.S.C. § 1818(i).

Further undermining the Panel's reasoning is the fact that many consumer protection statutes do not rely entirely (or at all) on private parties for enforcement and instead bring to bear the resources of federal or state agencies to ensure that regulated

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Million for Consumer Redress" (Jan. 26, 2006); "Fairbanks Capital Settles FTC and HUD Charges" (Nov. 12, 2003) ($40 million in consumer redress in settlement of charges alleging illegal practices in servicing subprime loans); "Home Mortgage Lender Settles "Predatory Lending" Charges" (Mar. 21, 2002) and "Subprime Loan Victims to Receive Additional Redress" (Feb. 2, 2004) ($65 million in consumer redress paid by First Alliance Mortgage Company in settlement of charges alleging unlawful lending practices).

entities remain compliant with the law. For example, TILA authorizes enforcement authorities to order restitution whenever a creditor discloses a finance charge or annual percentage rate ("APR") that is materially inaccurate. Subject to certain limited exceptions, the enforcement agencies are *required* to order restitution for violations that result from a clear and consistent pattern or practice of violations, gross negligence or a willful violation intended to mislead the consumer. 15 U.S.C. § 1607. Persons who willfully and knowingly violate TILA are subject to fines up to $5,000 and/or imprisonment up to one year. 15 U.S.C. § 1611.

These powerful inducements to comply with TILA are not available to private litigants who must instead show detrimental reliance upon a disputed disclosure to obtain actual damages. *See, e.g., Vallies v. Sky Bank*, 591 F.3d 152, 154 (3d Cir. 2009). The TILA enforcement agencies can (and do) order broad-based relief without regard to the procedural requirements of Fed. R. Civ. P. 23 and the numerous difficulties and legal costs associated with determining compliance with the Rule.

Agency enforcement powers are not static. Just last month, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376. Title X of the Dodd-Frank Act, *id.*, §§ 1001-1100H, designated the "Consumer Financial Protection Act of 2010" (the "CFPA"), establishes a new Bureau of Consumer Financial Protection (the "Bureau"), housed in the Federal Reserve System and with an annual budget equal to at least 10% of the System's operating expenses (approximately $550 million based on 2009 figures), plus an additional

$200 million per year for up to five years at the Bureau's request.

The Bureau is responsible for supervising and examining the consumer compliance of depository institutions with more than $10 billion of assets, most participants in the mortgage lending industry, student and payday lenders, larger participants in markets for other financial services and companies engaged in conduct that poses risks for consumers, as determined by the Bureau based on complaints or information from other sources. *Id.*, §§ 1024-1026. Additionally, the Bureau has sweeping authority to issue rules, applicable to virtually all providers of consumer financial products and services, identifying as unlawful acts or practices it defines as "unfair, deceptive, or abusive" in connection with the offer or provision of a consumer financial product or service to a consumer. *Id.*, § 1031.

Significantly, Congress did *not* provide a private right of action for violation of Bureau rules. Instead, when the Bureau believes it has uncovered a violation of law, including its rules, the CFPA gives it a variety of potent enforcement powers. These include the authority to: (1) impose civil money penalties, ranging from $5,000 per day for garden-variety violations, to $25,000 per day for reckless violations, to $1 million per day for knowing violations; (2) issue cease-and-desist orders to restrain activity or require affirmative action; and (3) obtain various forms of equitable relief, such as rescission or reformation of contracts, refunds, restitution, disgorgement for unjust enrichment, damages or other monetary relief and limits on activities and functions. *Id.*, §§ 1053-55.

The CFPA confers enhanced enforcement powers on other governmental entities as well. Thus, State

attorneys general are expressly authorized to bring civil actions to enforce provisions of Title X or Bureau rules against virtually all providers of consumer financial services (including federally chartered providers), and state regulators are empowered to bring such actions against state-chartered entities. In such actions, the attorney general or regulator can obtain the various forms of relief available to the Bureau, other than civil money penalties, and any remedies otherwise provided by law. *Id.*, § 1042.

In short, there are severe potential consequences for companies that violate the law. There is no credible basis for State courts and/or the Ninth Circuit to invalidate agreements that require individual arbitration of claims.

CONCLUSION

For the foregoing reasons and the reasons set forth in ATTM's brief, *Amici* respectfully request that this Court reverse the judgment below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-893

IN THE
Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ARBITRATION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are arbitration law professors who teach and write about arbitration, including the Federal Arbitration Act's ("FAA") preemptive power over state law.[1]

Amici have an interest in the thoughtful vetting and resolution of important but overlooked FAA preemption issues—issues that continue, in our view, to confound the law of FAA § 2 preemption. Our primary objective in filing this brief is to place the case at bar in the context of these issues, in order to assist the Court in reaching the best possible decision for the development of FAA preemption law.

The views expressed in this brief are our own and do not reflect the beliefs of the institutions with which we are affiliated.

SUMMARY OF ARGUMENT

This brief is limited to addressing a central argument advanced by Petitioner and its *Amici*: namely, that the FAA preempts the *Discover Bank* rule because the rule applies only to dispute resolution clauses and not "all contracts," (Pet. Br. 17, 31), and thus fails to "place[] arbitration agreements on equal footing with all other contracts." (*Id.* at 28.)

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[1] The parties have filed letters consenting to the filing of any *Amicus Curiae* brief with the Clerk of the Court. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or its counsel made a monetary contribution to the preparation or submission of this brief.

We contend that the argument is fundamentally flawed for two independent reasons.

First, the FAA's purpose to make arbitration *agreements* as enforceable as any other contract is a means to an end, not an end in itself. That end has always been understood as enabling the arbitration *process* to compete on a level playing field with litigation, free of the artificial legal impediments that had once stood in its way. The problem that the FAA sought to address was not the problem of states having different rules for the enforcement of predispute arbitration agreements than they did, say, for exculpatory clauses or marriage contracts. Although contracts all share common elements, the law necessarily treats them differently (and for good reason): Some are entitled to the special remedy of specific performance; some are unenforceable because their subject matter is contrary to public policy; others must be in writing in order to be enforced.

The true purpose of the FAA was therefore not to make all contracts enforceable in the same way, for enforceability plainly differs from contract to contract. Instead, it was to overcome the early "judicial hostility to *arbitration*," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (emphasis added), so that the arbitral process could emerge as a genuine "alternative to litigation." (Pet. Br. at 26.) We agree with Petitioner that this is, in effect, a type of antidiscrimination principle. (*Id.* at 28, 29.) But it is a principle primarily directed at arbitration *qua* process, not *qua* contract.

Second, even if the FAA's antidiscrimination principle seeks to eliminate the law's differential

treatment of arbitration agreements *vis-à-vis* other agreements—rather than, as we argue, its treatment of arbitration *vis-à-vis* litigation—a state law need not be preempted just because it fails to apply universally to "all" contracts. (Pet. Br. at 3, 17, 31, 40.) Such a requirement is not just logically incoherent, it is detrimental to any national policy that seeks the legitimate, balanced development of arbitration.

ARGUMENT

I. THE TRUE MEANING OF THE FAA'S NONDISCRIMINATION PRINCIPLE IS TO ENSURE "EQUAL FOOTING" BETWEEN ARBITRATION AND LITIGATION

Petitioner is correct to note that FAA § 2 expresses a "fundamental nondiscrimination principle." (Pet. Br. at 28; *see id.* at 27, 29, 36, 37, 42.) Numerous courts and commentators have likewise grasped the nondiscrimination underpinnings of FAA § 2 preemption.[2] So, too, have several *Amici* who support Petitioner. But Petitioner is incorrect to contend that the end of that principle is to treat arbitration agreements equally with other contracts.

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[2] *See, e.g., Banc One Acceptance Corp. v. Hill*, 367 F.3d 426 (5th Cir. 2004); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112-13 (Cal. 2005); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Resol. 469, 483 (2006); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1955 & n.171 (2003); Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 Quinnipiac L. Rev. 795, 797–98 (2006).

True, abrogating the ancient ouster and revocability doctrines that had disadvantaged pre-dispute arbitration agreements more so than other contracts was an important part of the FAA's antidiscrimination purpose. This is why the Court was correct to observe that "placing arbitration agreements 'upon the same footing as other contracts'" is a critical purpose of the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984). But it is not the only or even the overriding purpose, as the Court well knows. *See, e.g., Wilko v. Swan*, 346 U.S. 427, 431 (1953) (describing the FAA's purpose as furthering "the need for avoiding the delay and expense of litigation" but no where citing importance of treating arbitration agreements the same as other agreements), *overruled by Rodriguez de Quijas*, 490 U.S. at 484 (1989).

None of the Court's decisions hinges on the purported equality between arbitration agreements and all other agreements—something that is anyhow impossible given the sheer heterogeneity of contracts. Instead, the Court's opinions stand for the proposition that states may not treat arbitration agreements worse than other agreements simply because of unwarranted "prejudice," (Brief of the U.S. Chamber of Commerce as *Amicus Curiae* [hereinafter Chamber *Amicus* Br.] at 20), against the arbitral *process*.[3] The substance of the FAA's nondiscrimina-

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[3] *See, e.g.*, Transcript of Oral Argument, *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 2007 WL 3283181 at *44, (No. 06-989) (Stevens, J.) ("[T]he whole premise of the [FAA] . . . [was that] there was bias against arbitration."); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 Brook. L. Rev. 1381, 1384 (1996).

tion mandate—notwithstanding the way in which it has come to be expressed over time—is to ensure that arbitration is placed on an "equal footing" with litigation.

Prior to the case at bar, no case before the Court has necessitated clarifying this distinction. This case presents the ideal vehicle for doing so, and not one day too soon. Lower courts are increasingly being asked to predict how the Court would decide whether FAA § 2 preempts state statutes and judicial decisions that, like the *Discover Bank* standard, (i) treat arbitration and litigation equally but (ii) do not literally treat arbitration agreements the same as all other agreements. Because such laws do not offend the FAA's core nondiscrimination principle, we argue that they are not preempted.

A. The FAA's Foundational Purpose Was To Prevent Unjustified Discrimination Against Arbitration So That It Could Emerge As A Bona Fide Alternative To Litigation

The FAA was first and foremost a response to the ancient common law "hostility" toward arbitration *qua* process, not *qua* contract. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (emphasis added). The pre-dispute agreement to arbitrate was the object of that hostility only insofar as it made possible the resolution of disputes out of court.

1. Historically, English judges had crafted artificial rules such as the revocability doctrine because they sought to "retain, if not extend, their

jurisdiction" over that of their private sector competitors—not because they had an interest in privileging other agreements over arbitration agreements.[4] Early twentieth century commercial reformers likewise did not lobby for the FAA because they believed there was something intrinsically unfair about enforcing pre-dispute arbitration agreements with less vigor than, say, plumbing contracts. Rather, they did so because they sought a viable alternative to the perceived "evil[s]" of litigation. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Judiciary*, 68th Cong. 34–35

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[4] *See U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915); Sterling, *To Make Valid and Enforceable Certain Agreements for Arbitration*, S. Rep. No. 68–536, at 2-3 (1924); Transcript of Oral Argument at *47, *Hall Street*, 128 S. Ct. 1396 (Ginsburg, J.) (describing the pre-FAA "distrust of arbitrators" in terms of a fear by judges that "arbitrators are stepping on our turf").

(1924) [hereinafter 1924 hearings] (brief of Julius Henry Cohen).[5]

2. The text of the FAA is also inconsistent with the goal of placing arbitration agreements on the same footing as other contracts. First, the statute guarantees specific performance for breaches of arbitration agreements, 9 U.S.C. § 4 (2009), a special remedy denied to the vast majority of contracts.[6] Second, it provides an expedited procedure whereby arbitration agreements and arbitral awards may be enforced in court on a motion, without the need to initiate a separate cause of action for breach of the

[5] *See also American Airlines, Inc. v. Louisville & Jefferson County Air Bd.*, 269 F.2d 811, 816 (6th Cir. 1959) (noting that the reason for making arbitration agreements "as effective enforceable [sic] as any other contract" was to enable "contracting parties thereby to avoid . . . the 'delay and expense of litigation'"); *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 8–9, 14 (1923) (describing one of the benefits of the FAA as "reduc[ing] litigation" but no where mentioning the goal of treating arbitration agreements the same as other agreements); Graham, *To Validate Certain Agreements for Arbitration*, H.R. Rep. No. 68-96, at 2 (1924) (urging passage of the FAA because "there is so much agitation at the costliness and delays of litigation"); S. Rep. No. 68-536 at 3 (describing FAA § 2's purpose in terms of enforcing arbitration agreements like any contract, but acknowledging the fundamental business interest driving this purpose as a "desire to avoid the delay and expense of litigation"); 66 Cong. Rec. 984 (1924) (describing the underlying reason for making arbitration agreements as enforceable as other contracts in terms of advancing "business interests [in avoiding] . . . so much delay attending the trial of lawsuits in courts").

[6] *See* Restatement (Second) of Contracts § 359 (1981).

arbitration agreement.[7] Third, because the FAA has been interpreted as preempting any state legislation that "singl[es] out arbitration provisions for suspect status," *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996), it effectively immunizes arbitration agreements from the contract defense of illegality—a defense that may be invoked to deny enforcement of most (if not all) other agreements. Finally, a fundamental tenet of domestic and international arbitration law—the so-called "separability doctrine"—applies only to arbitration agreements and no other agreement.[8] This doctrine indulges the fiction that arbitration clauses are "separable" from the container contract, such that even where the latter has been shown to be the product of duress or fraud in the inducement, the former remains enforceable in principle. *See Preston v. Ferrer*, 128 S. Ct. 978, 984 (2008). Far from securing "equal footing" among contracts, these features of the FAA unabashedly *favor* arbitration agreements.[9]

The special solicitude that the FAA expresses toward the agreement to arbitrate *is*, however, consistent with "rais[ing] arbitration to the status

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[7] *See* 9 U.S.C. § 4 (2009) (setting forth streamlined procedure for specific enforcement of arbitration agreements); *id.* at § 9 (setting forth streamlined procedure for enforcement of arbitral awards); *id.* at § 16 (denying interlocutory appeal of orders to compel arbitration).

[8] *See, e.g.*, 9 U.S.C. § 4; Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1010 (1996).

[9] *See, e.g.*, Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 Pepp. Disp. Resol. L.J. 197, 210 (2006); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Contract and Public Procedure in Need of Congressional Control*, 35 U. Rich. L. Rev. 1085, 1088 (2002).

and dignity of judicial process."[10] According to the FAA's original proponent, Julius Henry Cohen, the pre-FAA legal climate was biased in favor of litigation.[11] The FAA would therefore need to make arbitration agreements robustly enforceable—perhaps even *more* than other contracts—in order to enable the arbitral process to compete on a level playing field with courtroom adjudication.

3. Ensuring that arbitration agreements would be treated just like any other contract is certainly an important step toward leveling the dispute resolution playing field in this way. If arbitration agreements continued to be saddled with arbitrary common law restrictions, the FAA could scarcely make good on its purpose of "provid[ing] a [*bona fide*] . . . alternative to litigation." (Pet. Br. at 26.)[12] But that is not to say that the FAA's mission begins and ends with making arbitration agreements literally "as enforceable as other contracts, but not more so." *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Contracts are by definition heterogeneous. Consider the endless variety of standards for contract enforcement that prevail in most jurisdictions:

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[10] Joseph Wheless, *Arbitration as a Judicial Process of Law*, 30 W. Va. L. Q. 210, 216 (1924); Comm. on Commerce, Trade and Commercial Law, 11 A.B.A. J. 153, 154 (1925) (noting the FAA's innovation of allowing arbitral awards to be "docketed as though rendered in an action" so as to have "the same force and effect and [be] subject to the same provisions of law as judgments in an action").

[11] Julius Henry Cohen, *Commercial Arbitration and the Law* 15 (1918).

[12] *See* Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 20 (1992).

Gambling, bribery, and usurious contracts are generally unenforceable as contrary to public policy. 7 Richard A. Lord, *Williston on Contracts* §§ 16:1, 17:1 (4th ed. 2009); 9 *id.* § 20:38. Non-compete, exculpatory, assignment, forum selection, and choice-of-law clauses are enforceable but only within reason. *See* Restatement (Second) of Contracts §§ 186–88, 195, 317; Restatement (Second) of Conflict of Laws §§ 80, 187 (1971). Marriage contracts, suretyship agreements, and contracts for the sale of securities are enforceable only if in writing. *See* Restatement (Second) of Contracts §§ 112, 124; Uniform Commercial Code § 8-319 (2009). Real estate, adoption, and insurance contracts are typically enforceable through the remedy of specific performance, while contracts for personal services or the sale of goods generally are not. *See* Restatement (Second) of Contracts § 367; 25 *Williston on Contracts* §§ 67:61, 67:87, 67:94. And so on.

The upshot is that there is no uniform standard of contract enforceability to which arbitration agreements could possibly aspire. Nor would such a standard be desirable, as different enforcement rules for different types of contracts helps further other public policies, such as promoting free markets, policing fraud and sharp dealing, or deterring tortuous and anti-social behavior. The FAA's purpose was simply to ensure that arbitration agreements were not denied enforcement because of unjustified considerations such as the historic "mistrust" or "suspicion" of arbitration—considerations that generally did not inure to the detriment of other contracts. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 231 (1987); *Mitsubishi Motors Corp. v. Soler Chrys-*

ler-Plymouth, Inc., 473 U.S. 614, 627 (1985). This is the sense in which FAA § 2 directs courts "to enforce . . . agreements to arbitrate, like other contracts, in accordance with their terms"—that is, according to their merits. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

4. Outside of the preemption context, the resounding antidiscrimination message of the Court's seminal FAA decisions has been that arbitration must be considered litigation's equal, even with respect to the resolution of federal statutory claims. This was not always the case: It used to be that the Court regarded the arbitration process as positively "inferior to judicial processes." *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974). As compared with a judicial forum, for instance, arbitration affords a less robust factfinding process. *See id.* at 57–58. Without legal training, arbitrators were considered prone to misinterpret and misapply governing law. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981); *cf. Prima Paint*, 388 U.S. at 407 (Black, J., dissenting) (considering it "fantastic" that arbitrators could "decide legal issues"). The very same qualities that made arbitration "efficient, inexpensive, and expeditious" for merchants, *Gardner-Denver*, 415 U.S. at 57–58, were thought to render it inappropriate to adjudicate rights under federal statutes such as Title VII and the 1933 Act that embody important public values. *See, e.g., id.* at 49–50; *Wilko*, 346 U.S. at 438. For these and other reasons, the Court had long held that arbitration was *not* "merely a form of trial."

Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956).

By the mid-1980s, however, the Court began to chart a dramatically different course. It came to see its earlier assessments of arbitration as ""pervaded by . . . 'the old judicial hostility to arbitration.'" *Rodriguez de Quijas*, 490 U.S. at 480; *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009). On closer inspection, it found little evidence to suggest that arbitrators were "[in]capable of handling the factual and legal complexities" of statutory claims. *See McMahon*, 482 U.S. at 232. And notwithstanding the other structural differences between arbitration and litigation, there was no reason to assume at the outset that the arbitral process was incapable of adequately resolving such claims. Whereas the Court had previously viewed the election to arbitrate as a substantive waiver of "the parcel of rights behind a cause of action," *Bernhardt*, 350 U.S. at 203, it now came to see the election as little more than a tradeoff between comparable dispute resolution forums. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause.").

The Court's later nonarbitrability jurisprudence therefore stands for the more enlightened proposition that lower courts may no longer treat arbitration as inferior to litigation based on "outmoded presumptions" that were now "far out of step" with modern realities. *Rodriguez de Quijas*, 490 U.S. at 481. Instead, arbitration is to be pre-

sumed an "adequate substitute for [courtroom] adjudication." *McMahon*, 482 U.S. at 229.

This presumption does not completely foreclose treating arbitration and litigation differently in circumstances where they are, in fact, fundamentally different. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (leaving open the possibility that an arbitration agreement will not be enforced where a party would be unable "effectively [to] vindicat[e] her federal statutory rights in the arbitral forum"). It only forbids such disparate treatment based on biases against arbitration—"generalized attacks" that "rest on suspicion of arbitration as a method of . . . resolving disputes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

In the almost forty years of this Court's FAA jurisprudence from *Wilko* to *Gilmer*, therefore, the relevant comparison has always been between arbitration and litigation—not arbitration agreements and other agreements. The refusal to enforce arbitration agreements *per se* was never the problem; rather, it was the refusal to do so based on misconceptions about the arbitration process.

5. In the preemption context this basic principle of nondiscrimination between arbitration and litigation has come to be conflated with the purpose of "plac[ing] arbitration agreements upon the same footing as other contracts." (Pet. Br. at 2.) Even in the preemption area, however, the Court's precedents reflect a core understanding of the FAA's "equal footing" mandate as primarily designed to combat unwarranted discrimination against arbitra-

tion as a process rather than a contract. As articulated by *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and its progeny, the fundamental preemptive message of FAA § 2 is that states may not, without good reason, require a judicial forum when federal law allowed the parties to contract for judicial alternatives. *See id.* at 10; *see also Preston*, 128 S. Ct. at 987 (extending *Southland* to administrative proceedings); *Perry v. Thomas*, 482 U.S. 483, 489 (1987). In other words, from a federalism perspective the trouble with the states was that they were anti-arbitration (or pro-litigation)—not that they privileged other agreements at the expense of arbitration agreements.[13]

B. Published Lower Court Decisions Recognize The FAA's Primary Purpose Of Placing Arbitration On The Same Footing As Litigation, Even Though They Continue To Describe This In Terms of Nondiscrimination Between Arbitration Agreements And Other Agreements

The court below correctly held that FAA § 2 did not preempt the *Discover Bank* rule because the rule treats collective action waivers with respect to arbitration and litigation equally, and thus could not

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[13] *See Mitchell v. Am. Fair Credit Ass'n., Inc.*, 122 Cal. Rptr. 2d 193, 201 (Cal. App. 2002); *see also Fosler v. Midwest Care Ctr. II, Inc.*, 911 N.E.2d 1003, 1012 (Ill. App. Ct. 2009) (holding that any "pro-judicial forum" state legislation is necessarily "anti-arbitration" and therefore preempted by the FAA); Stephen J. Ware, *The Alabama Story*, 7 Disp. Resol. Mag. 24, 27 (2001).

possibly re-enact judicial hostility toward the arbitral process. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009). Many courts have similarly grasped FAA § 2's core purpose of leveling the playing field between arbitration and litigation, even though they continue to express this purpose in terms of placing arbitration agreements on the same footing as other *agreements*.[14]

For instance, in *Carbajal v. H&R Block Tax Services, Inc.*, 372 F.3d 903 (7th Cir. 2004) (Easterbrook, J.), the Seventh Circuit understood the basic point that a general contract defense such as unconscionability might be preempted by the FAA if it were applied in a way that discriminated against arbitration. The "cry of 'unconscionable!'" it explained, may not be used to "disparage[] the [arbitration process] as second-class adjudication." *Id.* at 906. In the same breath, however, it invoked the familiar comparison with other contracts: "It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms." *Id.*

Courts other than the Seventh Circuit (and the Ninth Circuit below) have similarly refused to preempt state unconscionability rules on the quite sensible ground that those rules did not treat arbitration any differently from the way they treated litigation. Thus, the reason why the Second Circuit held

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[14] *See, e.g.*, *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 990 (9th Cir. 2007); *Mitchell*, 122 Cal. Rptr. 2d at 201 (describing the "common chord" of FAA preemption cases in terms of ensuring that the arbitration process is not "treated . . . as a disfavored method of resolving disputes," while nonetheless describing the FAA's goal as "putting arbitration clauses on an equal footing with other contracts").

that FAA § 2 does not preempt the *Discover Bank* rule is that the rule applies "*whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration.*" *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 134 (2d Cir. 2010) (quotation omitted). Although the court described this in terms of "plac[ing] arbitration *agreements* with class action waivers on the exact same footing as *contracts* that bar class action litigation outside the context of arbitration," *id.* (emphasis altered, quotation omitted), its underlying rationale was that the *Discover Bank* rule treated arbitration and litigation equally.

Similarly, in *Homa v. American Express Co.*, 558 F.3d 225, 230 (3d Cir. 2009), the Third Circuit held that New Jersey's equivalent of the *Discover Bank* rule was not preempted by the FAA because it applied equally to class action waivers "'whether in arbitration or in court litigation.'" *Id.* at 230. Nonetheless, the court portrayed this rule as a "general contract defense" that treated arbitration agreements the same as all other agreements, even though the rule did nothing of the sort: It applied only to dispute resolution agreements.

The same is true of *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004), a case Petitioner mistakenly cites in its favor. There, the Fifth Circuit correctly held that the lower court's use of the unconscionability defense to invalidate an arbitration clause was not preempted by FAA § 2. The Fifth Circuit's rationale was that the use of the defense did not "discriminate against arbitration" in the sense that it did not "necessarily ex-

press the impermissible view that arbitration is inferior to litigation." *Id.* at 170. Despite this, the court invoked the familiar mantra that "Section 2 of the FAA puts arbitration agreements on the same footing as other contracts," which it understood as requiring arbitration agreements to be enforced "*unless* they are invalid under principles of state law that govern all contracts." *Id.* at 166.

In these and other examples, judges and commentators[15] betray a consistent understanding of the FAA § 2's purpose as ensuring "equal footing" between arbitration and litigation, even though they have continued to describe this in terms of "plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

Up to this point, there has simply been no need for the Court to address this tension.[16] As the instant case suggests, however, this tension is quietly building up in the lower courts. And judging from the numerous petitions for *certiorari* that have

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[15] *See, e.g.*, 1 Ian R. Macneil et al., *Federal Arbitration Law* §10.7.2, at 10:52 (1999) (arguing that a law is "generally applicable" if it "applie[s] equally to judicial and arbitral proceedings"); Jane VanLare, Comment, *From Protection to Favoritism? The Federal Policy Toward Arbitration Vis-à-Vis Competing State Policies*, 11 Harv. Negot. L. Rev. 473, 490–91 (2006) (describing the FAA's purpose on the one hand as "mak[ing] arbitration agreements equal in strength to other contractual provisions" and on the other as placing "arbitration on an equal footing with litigation"); Ware, *supra*, at 1026 (arguing that if punitive damages waivers are not unconscionable in the litigation context, neither should they be in the arbitration context, but justifying this in terms of "'placing arbitration agreements upon the same footing as other contracts'").

[16] This is for some of the same reasons explained in section II.C, *infra*.

implicitly grappled with it in recent years,[17] the issue is likely to recur if left unresolved. We therefore urge the Court to clarify that FAA § 2's central nondiscrimination mandate is to reverse unjustified hostility against arbitration as a process (and only secondarily as a contract) so that arbitration can compete on a level playing field with litigation.

C. The Goal Of Non-Discrimination Between Arbitration And Litigation Is Not A Slippery Slope To Making Arbitration And Litigation Identical

Petitioner argues that interpreting FAA § 2's antidiscrimination principle so as to place arbitration and litigation on the same footing would 1) give the states license to transform arbitration into litigation, and 2) conflict with this Court's decision in *Preston v. Ferrer*, 128 S. Ct. 978 (2008). Both arguments are without merit.

1. The FAA's goal of nondiscrimination between arbitration and litigation should not be confused with the very different goal of casting arbitration in litigation's image—one that we are united with Peti-

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[17] See, for instance, *certiorari* petitions filed in: *Cellco Partnership v. Litman*, 2010 WL 3700269 (No. 10–398); *Beverly Enters.-Ill. v. Mitchell*, 130 S. Ct. 1698 (2009) (No. 09–747); *Beverly Enters.-Ill., Inc. v. Blazier*, 130 S. Ct. 1698 (2009) (No. 09–746); *Athens Disposal Co. v. Franco*, 130 S. Ct. 1050 (2009) (No. 09–272); *Circuit City Stores, Inc. v. Gentry*, 128 S. et. 1743 (2008) (07-998); *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (No. 07–976); *County Bank of Rehoboth Beach v. Muhammad*, 127 S. Ct. 2032 (2007) (06–907); *Cingular Wireless LLC v. Mendoza*, 126 S. Ct. 2353 (2006) (05–1119).

tioner in rejecting. Some of arbitration's chief virtues inhere in those very differences: streamlined discovery and review, confidentiality, and the selection of private neutrals, to name a few.[18] But there is no inconsistency in applauding those distinctions while nonetheless insisting that states may not discriminate improperly against arbitration.

The operative distinction here is between simple equality and equality of opportunity. FAA § 2, like the vast majority of antidiscrimination regimes, represents a rule of equal opportunity. Equal opportunity does not require all persons or things to be treated exactly the same in all ways. Title VII, for example, prohibits discrimination on the basis of religion but also requires employers to "reasonably accommodate" religious differences. *See* 42 U.S.C. §§ 2000e(j), 2000e-2 (2002); *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 615-16 (9th Cir. 1988). In certain circumstances, Title IX and the Equal Protection Clause not just permit, but may also require, government-funded educational institutions to offer athletic teams segregated by gender. *See, e.g., Clark v. Arizona Interscholastic Ass'n.*, 695 F.2d 1126, 1131-32 (9th Cir. 1982); *O'Connor v. Board of Educ. of Schools Dist. No. 23*, 645 F.2d 578, 582 (7th Cir. 1981). In these and other examples, antidiscrimination law recognizes that perfect equality is sometimes not just impossible but also positively undesirable, and thus that equal opportunity may in certain

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[18] *See, e.g.*, 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

instances require unequal treatment.[19] The point of an antidiscrimination regime is not to erase all "'[i]nherent differences,'" for some may instead be "cause for celebration." *See United States v. Virginia*, 518 U.S. 515, 533 (1996). Rather, it is to ensure that those differences are not used to "create or perpetuate the legal, social, and economic inferiority" of certain persons or things. *See id.* at 534.

The law has tended to capture this insight with the notion that nondiscrimination only requires persons or things that are "similarly situated [to] be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). By the same token, "things which are different in fact" need not "be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Thus, the Court has upheld gender classifications based on sex if they are "not invidious, but rather realistically reflect[] the fact that the sexes are not similarly situated." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981). The rationale is that if there are legitimate differences between men and women, it is at least as likely that their disparate treatment is a function of those differences rather than of unjustified criteria

[19] *See, e.g.*, 42 U.S.C. § 2000e-2(e) (2002) (permitting employer to discriminate intentionally if a protected characteristic other than race is a "bona fide occupational qualification"); General Agreement on Tariffs and Trade ("GATT") art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (permitting member states to discriminate against goods of other contracting states, *inter alia*, in order to "protect human, animal, or plant life"); Laurence Tribe, *American Constitutional Law* § 16-1, at 1437 (2d. ed. 1988) (arguing that the "right to equal treatment" guaranteed by the equal protection clause is not a "universal demand for sameness").

such as "old boy" networks or negative stereotypes about women.

In the same vein, the basic antidiscrimination message of the Court's nonarbitrability jurisprudence is that arbitration and litigation are similarly situated in their capacity to resolve adequately the vast majority of civil disputes. States ignore this message when, for no reason other than mistrust of the arbitral process, they treat arbitration and litigation differently in this respect.

But arbitration and litigation are generally *not* similarly situated in terms of the availability of juries, the need to publish opinions, the scope of discovery, and the applicability of rules of courtroom procedure. (*See* Pet. Br. at 29, 41, 50.) For these are the very "evils" of litigation that the FAA was designed to help merchants avoid.[20] Imposing them on arbitration thereby treats similarly two dispute resolution processes that are essentially different with respect to those "evils." This is no less an instance of discrimination. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("[S]ometimes the grossest discrimination can lie in treating things that are

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[20] *See* 1924 hearings, *supra*, at 34–35 (identifying among such "evils": expense, procedural delay caused by motions and "other steps taken by litigants," and the jury's lack of familiarity with business realities).

different as though they were exactly alike.").[21] Petitioner reaches essentially the same conclusion when it argues that if a state were to require the use of juries or published awards in arbitration, this would raise an inference of precisely the type of "hostility" and "anti-arbitration" sentiment that the FAA was designed to reverse. (Pet. Br. at 29, 40.)

Moreover, it is far from clear that certain benefits or burdens that apply to litigation should not apply equally well to arbitration. For better or worse, in the past several decades arbitration has evolved into something of a "civil court of general jurisdiction."[22] To that end, if judges hearing a particular case would be entitled to award certain forms of relief such as punitive damages, the law has evolved to enable arbitrators to do so, too. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 n.7 (1995). If judges are immune from suit, so, too, were arbitrators. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993).

By emphasizing the ways in which arbitration and litigation are different, Petitioner ignores the equally important ways in which they are the same.

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[21] *See also United States. v. Booker*, 543 U.S. 220, 252-53 (2005) (Breyer, J.) (holding that different criminal conduct should not receive same punishment under U.S. Sentencing Guidelines); Appellate Body Report, *United States Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 164, WT/DS58/AB/R (Oct. 20, 1998) (adopted Nov. 6, 1998) (finding a violation of GATT art. XX's non-discrimination principle where the U.S. required all shrimp exporting countries to adopt "essentially the same" measures for the protection of sea turtles "without taking into consideration different conditions which may" prevail in those countries).

[22] Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 Nw. U. L. Rev. 1, 6, 8 (1997)

There can be no worse outcome for arbitration if states are entitled to regulate litigation for the public good but the FAA disables them from regulating arbitration in exactly the same way where the two are similarly situated. This will only exacerbate the perception of arbitration as a forum in which the usual rules do not apply—a dubious version of litigation rigged in favor of corporate interests. It will defeat the overriding mission of all good arbitration law and policy—the FAA included—which is to enable arbitration to stand on its own two feet as a "legitimate," "credibl[e], and "true" alternative to litigation.[23]

2. In its petition for *certiorari*, Petitioner incorrectly argued that the Court's recent decision in *Preston*, 128 S. Ct. 978, "forecloses" an interpretation of FAA § 2's nondiscrimination principle as requiring arbitration to be placed on the same footing as litigation. (Pet. Cert. at 28-29.)

The California Talent Agency Act ("TAA") that was held preempted in *Preston* vested exclusive jurisdiction in the California Labor Commissioner to decide disputes involving talent agents and their clients—even those disputes the parties had agreed to arbitrate. Because the TAA thereby withheld such jurisdiction equally from both arbitration *and* courts of law, Petitioner reasons that FAA preemption cannot turn on whether arbitration and litigation are treated the same.

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[23] *See Securities Indus. Assoc. v. Connolly*, 883 F.2d 1114, 1115 (1st Cir. 1989) (Selya, J.); Revised Uniform Arbitration Act §§ 6 cmt., 23 cmt. b (2000).

Petitioner's argument hinges on drawing a sharp distinction between judicial and administrative proceedings—a distinction whose salience is questionable for at least two reasons. First, both the administrative and judicial forums in *Preston* were state-sponsored. The same danger that states would discriminate in favor of their own dispute resolution processes is no less pertinent in the administrative than in the litigation context. Second, even though the TAA gave the Labor Commissioner original jurisdiction to hear talent agent disputes, it provided a right of *de novo* review solely to the Superior Court. *See id.* at 985-86 & n.6. The administrative forum in *Preston* was therefore intimately linked to the judicial system—so much so that the Court explicitly "disapprove[d] the distinction between judicial and administrative proceedings." *Id.* at 987. Instead, it held that "state laws lodging primary jurisdiction in another forum, *whether judicial or administrative*," are preempted by the FAA.[24] *Id.* at 981 (emphasis added). Consistent with *Preston*, in this brief we use the term "litigation" broadly to include administrative proceedings.

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[24] This is consistent with lower court precedents as well. *See, e.g., Connolly*, 883 F.2d at 1120 n.4 ("That the restriction is administrative . . . [is irrelevant]. The gravamen of the FAA is to preserve the arbitral bargain against [any] external onslaughts manifesting hostility to arbitration"); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 274 n.6 (Cal. Ct. App. 2003) ("Court decisions on the preemptive effect of the FAA do not distinguish between . . . administrative regulations and judicial decisions that burden arbitration agreements.").

II. EVEN IF THE FAA'S PURPOSE IS TO ENSURE EQUAL TREATMENT BETWEEN ARBITRATION AGREEMENTS AND OTHER AGREEMENTS, IT IS NOT NECESSARY FOR A LAW TO APPLY TO "ALL" AGREEMENTS IN ORDER TO AVOID PREEMPTION

Petitioner contends that "'as a matter of federal law, arbitration agreements and clauses are to be enforced *unless* they are invalid under principles of state law that govern all contracts.'" (Pet. Br. at 3.) On this view, the *Discover Bank* standard is preempted simply because it is "a rule applicable only to dispute-resolution agreements," not a rule that "appl[ies] universally to 'any' and *every* contract." (Chamber *Amicus* Br. at 25; *see also* Pet. Br. at 3, 17, 31, 40 (emphasis added).)

The "all contracts" standard relied on by Petitioner cannot be correct for at least two reasons. First, it is logically incoherent. Second, it makes for unsound policy in the "mandatory" binding arbitration area. Thus, even if the FAA's organizing purpose were to place arbitration agreements on the same footing as other *agreements*, this plainly cannot mean *all* other agreements.

A. The "All Contracts" Standard Is Logically Incoherent

As a logical matter, no law can apply to all contracts except by distorting beyond all recognition the common-sense meaning of the term "apply." A law "applies" in any meaningful sense only to agreements whose enforceability it has the power to

affect. It fails to apply to agreements that it leaves unaffected.

1. Contrary to popular orthodoxy in this area, not even native contract law principles apply to all contracts. Take the unconscionability defense. Even in its "pure" form, the defense only has the ability to affect the enforceability of agreements tainted by indicia of unconscionability. It is irrelevant to, and leaves completely intact, all other conscionable agreements.

For this reason, "generally applicable" contract law doctrines quite clearly fail to "place[] arbitration agreements on equal footing with *all* other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 477 (2006) (emphasis added). In fact, their very purpose is to enforce *in*equalities among contracts based on defects such as the existence of unconscionable terms or conduct. Consider that the unconscionability defense does not even manage to place all *arbitration* agreements on the same footing because it properly refuses enforcement to some arbitration agreements but grants it to others. And given any pair of agreements—one arbitration and one non-arbitration—the doctrine has no qualms treating them unequally depending on the presence of certain impermissible procedural and substantive factors.

Because neither the so-called "ordinary" unconscionability rule nor the *Discover Bank* standard (even assuming they are different) applies to "all" contracts, FAA § 2 preemption simply cannot turn on this standard.

2. *Amici* American Banker's Association *et al.* nonetheless insist that ordinary contract law doctrines (which tend to be directed at procedural defects in contract formation) apply to all contracts regardless of subject matter, while the *Discover Bank* standard is limited to contracts relating to the subject of dispute resolution. But the strength of this retort hinges on maintaining a bright-line distinction between procedure and substance—a distinction that falls apart on further scrutiny.

First, the unconscionability defense depends at least in part on proving that the substance of the agreement—not just the process of its formation -- "shocks the conscience." 2A Lary Lawrence, *Anderson on the Uniform Commercial Code* § 2–302:27 (3d ed. 2009). The same goes for other contract doctrines such as impossibility or frustration of purpose, which have nothing to do with contract formation and much to do with the substance of the agreement struck (and the effect that future events or circumstances have on them). *Cf. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 556 (1995) (Stevens, J., dissenting) (describing impossibility as a generally applicable contract defense that avoids preemption by the FAA).

Second, the FAA is itself limited to certain subject matters insofar as it is inapplicable, *inter alia*, to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 2 (2009). Why should a law be procedural—and hence saved from preemption—if it regulates *all unconscionable agreements* falling within these subject matters, but

substantive—and hence preempted—just because it regulates only *unconscionable dispute resolution agreements* falling within those same subject matters?

3. Generic contract law defenses such as unconscionability seem as if they have universal application because they are *potentially* relevant to any contract regardless of subject matter: Any and all contracts, no matter what their content, must pass the unconscionability test. But the same can be said of the following hypothetical statute: "Any and all contracts that contain an arbitration clause must so indicate in underlined capital letters on the front page of the contract." By its terms, all contracts must comply with this requirement regardless of subject matter. But this simply cannot be what it means for a law to be a "ground[] . . . for the revocation of any contract," 9 U.S.C. § 2, and thus to avoid preemption by the FAA. For our hypothetical law is scarcely distinguishable from the state law at issue in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), which the Court correctly held was preempted by the FAA because it "singl[ed] out arbitration provisions for suspect status." *Id.* at 687. The upshot is that virtually any law can be re-described as *potentially* applicable to all contracts—even one that singles out arbitration.[25]

Potentially applicability, however, is not the same as *actual* applicability. No matter how it is re-

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[25] Notable examples include *Fosler v. Midwest Care Center II, Inc.*, 911 N.E.2d 1003, 1015 (Ill. App. Ct. 2009) (O'Malley, J., concurring); Brief in Opposition at 3, *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008) (No. 07-998) (quoting Cal. Civ. Code § 1668 (West 2007)).

worded, we know that the law at issue in *Casarotto* does not actually extend to all contracts. This is not just because the statute is irrelevant to all contracts lacking arbitration clauses, but more importantly because it is easily discernible whether or not a contract does in fact contain such a clause. But the same is not true for contract defenses such as unconscionability. Here, it is rarely immediately obvious that a given agreement will be found unconscionable or that facts extrinsic to the agreement will not later be discovered that reveal other defects in contract formation, such as fraud in the inducement. This is why generic contract defenses appear applicable, in principle, to any contract. But like all laws, those defenses unavoidably classify according to the type of misconduct they seek to police. *See Clements v. Fashing*, 102 S. Ct. 2836, 2845 (1982). Therefore, they actually apply only to contracts tainted by such misconduct and have no applicability whatsoever to all other contracts. As such, the reason why they avoid preemption, while other laws do not, cannot be that they apply to "all" contracts.

B. Sound Policy Militates Against The "All Contracts" Standard

1. The "all contracts" standard should be rejected for the further reason that it makes for bad policy in the "mandatory" binding arbitration area. Because legislatures rarely (if ever) pass legislation that governs "all" or even substantially all contracts, the standard has the effect of preempting practically *any* state law that happens to interfere with the enforcement of a challenged arbitration agreement.

This results in *de facto* field preemption—something the Court has explicitly rejected in the arbitration area.[26]

It is difficult to overstate the detriment of such a result. Many statutes and judicial decisions that are currently preempted under the "all contracts" standard seek to protect the weak and untutored rather than to revivify the ancient hostility toward arbitration. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 725 (4th Cir. 1990). The *Discover Bank* standard, for example, helps curb wrongful or exploitative conduct that might go unpoliced if left to the logic of the market. Any possible threat it poses to arbitration would appear to be outweighed by the considerable public good that it accomplishes.

2. Rather than to effectuate the voluntary self-governance of disputing parties, the inevitable consequence of the "all contracts" rule is to turn arbitration into a device for evading state governance. States will continue to regulate oppressive provisions in contracts that contemplate litigation for the resolution of disputes, FAA § 2 preemption notwithstanding. But where the contract drafter has been clever enough to insert an arbitration clause, the FAA will step in to displace the state regulation. Thus, the *Discover Bank* standard will continue to

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[26] It is well-settled that preemption based on FAA § 2 is a species of implied obstacle preemption rather than field preemption. *See, e.g., Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

protect consumers from class action waivers. But if Petitioner is correct, the standard will be preempted as to class *arbitration* waivers. The same will be true of virtually any other law that applies equally to arbitration and litigation, such as a law that gives franchisees a non-waivable right to collect attorneys' fees in certain disputes with franchisors, *see* Cal. Corp. Code Ann. §§ 31302.5, 31512 (West 2009), legislation that protects borrowers from waiving their right to punitive damages in lending agreements, *see* N.M. Stat. Ann. § 58-15-34(L)(4) (2009), or a statute that voids any provision in construction-related contracts requiring in-state adherents "to bring [any] suit or arbitration proceeding" in an out-of-state forum." *See* 9 La. Rev. Stat. Ann. § 2779 (West 2009). These laws will achieve their intended effect with respect to agreements that anticipate litigation, but the FAA will render them useless as to agreements that provide for arbitration.

In these circumstances, drafters of form contracts would be foolish *not* to insist on arbitration for the resolution of all disputes. For by doing so, they will manage to insulate themselves from just about any state measure that happens to interfere (in whole or in part) with the enforcement of an arbitration agreement. In an era in which arbitration has come under increasing criticism and scrutiny, this cannot be a positive development for the "national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

C. This Court Has Never Held That A State Law Must Apply To "All Contracts" In Order To Avoid Preemption By The FAA

To its credit, the Court has never explicitly held that the FAA preempts state laws unless they apply to "all contracts," even though it has used the "all contracts" language in several prior decisions.[27]

This is largely because the Court's seminal FAA preemption decisions have all involved state laws that either (i) clearly singled out arbitration[28] or (ii) did not single out arbitration but whose unavoidable consequence was to force into a judicial or administrative forum disputes that were otherwise destined for arbitration.[29] The first category of laws is preempted under current law because it runs afoul of the rule that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Casarotto*, 517 U.S. at 687. The second category is also preempted because it, too, expresses the old common-law suspicion toward arbitration as an inferior method of resolving disputes.

The *Discover Bank* rule falls into neither of these categories. Rather, it raises the hitherto unan-

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[27] *See Hall Street Assocs. LLC v. Mattel, Inc.* 128 S. Ct. 1396, 1402 (2008); *Buckeye*, 546 U.S. at 443. In neither of these cases, however, was the Court asked to determine whether the FAA preempts a law that applies to some, but not all, contracts. Accordingly, their references to "all contracts" are *dicta*.

[28] *See Casarotto*, 517 U.S. 681; *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) *Perry*, 482 U.S. 483.

[29] *See Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

swered question of whether a law that applies to some, but not literally all, contracts is nonetheless preempted by the FAA.

To be sure, the Court has held that "[s]tates may regulate . . . arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). It has also held that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9. But from neither of these pronouncements does it follow that a state law avoids FAA preemption *only if* it is completely general—that is, only if it (purportedly) applies to "all" contracts.

For these reasons, if the Court were to repudiate the "all contracts" standard in this case, it would not be overturning its own prior precedent.

III. FOR THE FOREGOING REASONS, FAA § 2 DOES NOT PREEMPT THE *DISCOVER BANK* STANDARD

The central issue in this case is whether the *Discover Bank* rule discriminates against arbitration so as to warrant preemption by FAA § 2 *even though* it treats arbitration and litigation exactly the same.

As explained by the court below, the underlying rationale behind the *Discover Bank* standard is that "when the potential for individual gain is small, very few plaintiffs, if any, will pursue individual arbitra-

tion or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers." *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (9th Cir. 2009). The standard was therefore designed to address the perceived unfairness of, and disincentives created by, collective action waivers—a problem as to which arbitration and litigation are similarly situated.

A law that treats arbitration and litigation similarly where they are similarly situated presents little danger of unthinkingly re-enacting the anti-arbitration hostility that the FAA was intended to

reverse.[30] Petitioner has not offered any alternative basis from which to infer discrimination other than to claim that *Discover Bank* is a "distortion" of ordinary unconscionability principles. (Pet. Br. at 47.) But the fact that the *Discover Bank* rule represents a "unique" breed of unconscionability, (*see id.* at 3, 4), even if true, does not compel the much more ambitious claim that the rule improperly *discriminates* against arbitration in the way that FAA § 2 forbids.

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[30] Several commentators cited by *Amici* in support of Petitioner only reinforce this conclusion. *See, e.g.*, F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 Cardozo J. Conflict Resol. 369, 391 (2009) (arguing that the *Discover Bank* standard is not preempted because it applies equally to arbitration and litigation); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 52 (2006) (arguing that a different California unconscionability standard should have been preempted by the FAA because it is "premised on the inferiority of arbitration as compared with litigation."); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1449-52 (2008) (questioning whether discrimination can be inferred from disparate unconscionability rulings, but considering such rulings only as to arbitration- and litigation-related agreements); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All The Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 78, 81 (2005) ("distill[ing]" a rule that an application of the unconscionability should be preempted if it "presume[s] that arbitration in and of itself is inferior to a court proceeding"); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 198–220 (2004) (inferring hostility in the application of the unconscionability defense only from disparate outcomes in cases involving arbitration and other dispute resolution agreements)

At most, Petitioner has shown that the California Supreme Court erroneously applied its own state's unconscionability rules in formulating the *Discover Bank* standard. But this in itself does not, and should not, create a federal issue.

CONCLUSION

The Court should hold that the *Discover Bank* rule is not preempted by FAA § 2 because the rule treats arbitration and litigation equally, and thus fails to discriminate against arbitration in the way the Court's jurisprudence forbids.

Respectfully submitted,

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Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CENTER FOR CLASS ACTION FAIRNESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CENTER FOR CLASS ACTION FAIRNESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Center for Class Action Fairness ("Center") respectfully submits this brief as *amicus curiae* in support of petitioner.[1]

INTEREST OF *AMICUS CURIAE*

The Center is a non-profit public-interest law firm that represents consumers *pro bono* in class action litigation across the United States by objecting to unfair class action settlements on their behalf. The Center's litigation on behalf of consumers has been covered by *Forbes*, the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, *see* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1624-25 (2009), the Center makes no effort to engage in *quid pro quo* settlements for profit. Instead, the Center — which has never settled an objection — represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from class action attorneys.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting petitioner's and respondent's blanket consent to the filing of *amicus curiae* briefs are on file with the Clerk of Court.

Accordingly, the Center can offer this Court a unique perspective on whether a waiver of class action treatment in an arbitration agreement is necessarily unconscionable. The Center's work makes it especially familiar with cases in which class settlements do not afford consumers meaningful access to justice. The unfair settlements the Center has fought are not isolated cases. Indeed, both economic theory and empirical evidence indicate that class actions in a significant number of cases leave consumers without meaningful relief. By contrast, in many cases individual arbitration provides consumers with efficient access to justice. Given its commitment to helping consumers, the Center has a strong interest in seeing the Court reverse the decision below, which rests upon an untenable assumption that class actions necessarily provide consumers with access to justice superior to that offered by alternative forms of dispute resolution such as arbitration.

SUMMARY OF ARGUMENT

Arbitration agreements "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). By holding that AT&T Mobility LLC's ("ATTM's") arbitration agreement is unenforceable because it does not allow class arbitrations, the Ninth Circuit's decision denies these benefits of arbitration to consumers even in the context of consumer-friendly arbitration agreements and effectively precludes individual arbitration agreements between companies around the country and their California customers. The Ninth Circuit's holding rests upon a belief in the exception-

alism of class actions, namely, that they are a uniquely superior form of dispute resolution the availability of which is necessary to vindicate consumer rights. But, as the Center's experience indicates, class actions are far from an exceptional vehicle for providing consumers with meaningful access to justice.

The Center concurs in petitioner's argument that the Federal Arbitration Act, 9 U.S.C. §§ 1-16, preempts States from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration when that procedure is not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims. The Center writes separately to address the Ninth Circuit's beliefs in the exceptionalism of class actions and in the need for courts to mandate their availability, which were critical to the court of appeals' holding. The Ninth Circuit, as well as the California Supreme Court, incorrectly presumes that class actions in practice must be available for the vindication of certain consumers' rights, and therefore that courts must strike down a clause requiring mandatory individual arbitration as exculpatory and thus unconscionable. Pet. App. 5a-6a & n.4 (*citing Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1109 (Cal. 2005)). Both economic theory and empirical evidence demonstrate that the Ninth Circuit's presumptions are incorrect for three reasons.

First, class treatment is neither the only means nor necessarily the best means of providing aggrieved consumers with meaningful relief. In fact, class action litigation suffers from several pathologies which often make it a poor vehicle for the vindi-

cation of consumer rights: it is expensive, raising costs to consumers in the long-run; it is slow-moving, bringing relief, if at all, long after class members have been harmed; even when class plaintiffs do succeed, class members face significant barriers to obtaining recovery; and class settlements often are a boon for class action attorneys but a bust for class members who recover little or nothing of value.

Second, arbitration is superior in many cases to class actions in vindicating consumer rights. Individual arbitration provides swift resolution of disputes; allows for easy and complete recovery; and does not pit the interests of consumers against an attorney tasked with representing their interests. Indeed, consumers consistently report that they prefer pursuing their claims in arbitration to class action litigation. Therefore, both for the individual complainant and for aggrieved individuals in the aggregate, a contract selecting individual arbitration often will afford consumers a better mechanism for obtaining meaningful relief than class action litigation.

Third, if class actions are a superior vehicle for vindicating consumer rights, then there is no need to mandate their availability with respect to small claims consumer class actions — market mechanisms will make them available to consumers. The marketplace includes a variety of mechanisms for addressing consumer complaints, and reflects consumer preferences among these various dispute resolution mechanisms. In addition, selecting efficient complaint resolution processes allows firms to pass cost savings along to consumers in the form of lower prices.

In sum, the decision below rests upon premises that are flatly inconsistent with economic theory and empirical evidence that show that class action litigation in many cases does not provide consumers with access to justice or meaningful relief. This Court should not deny consumers access to arbitration agreements such as AT&TM's, which provide effective incentives for resolving small claims through individual arbitration without the inefficiencies of the class action process. For these reasons, as well as those stated by the petitioner, this Court should reverse the decision below.

ARGUMENT

I. CLASS ACTIONS FREQUENTLY DO NOT PROVIDE CONSUMERS WITH MEANINGFUL RELIEF

Class actions were designed to provide injured parties with a more efficient means of accessing justice by aggregating claims for violations of individual rights. *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 71, 77. Some commentators bill class actions as exceptional vehicles for vindicating consumer rights. *See* Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735, 1738 (2006) ("class action waivers in certain contexts . . . prevent plaintiffs from effectively vindicating their substantive rights"); Nat'l Ass'n of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 377 (1998) ("Consumer class actions . . . often provide the

only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class.").

In practice, however, class actions have three significant structural deficiencies that often prevent consumers from obtaining meaningful relief. *First*, even when the class members are awarded relief in some form, the average class action takes years to reach a resolution. Thus, class members typically must wait a long time before they benefit from a successful class action. *Second*, even when the class action results in a recovery for the class members, obtaining relief may require navigating byzantine procedures that impose significant transaction costs. *Third*, too often class actions end in settlements that reward class members with pennies on the dollar, if that. Taken together, these three problems result in many class actions that fail to provide consumers with meaningful relief for violations of their individual rights.

A. Class Action Relief Comes, If At All, Long After Class Members Have Been Harmed

The nature of even successful class actions leads frequently to long delays before class members receive relief. The "typical class action" is characterized by "procedural complexity and slow pace." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 710 (1986). A recent study of all class action settlements in federal courts

in 2006 and 2007 found that consumer class actions on average take more than three years from the inception of the litigation to settlement. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. (forthcoming 2010), *available at* http://ssrn.com/abstract=1442108 (manuscript at 11, 12 tbl.2). Data from the states show similarly slow class action litigation. In California, for example, class actions take more than two years on average to proceed from filing to settlement or verdict at trial. *See* Office of Court Research, Administrative Office of the Courts, Findings of the Study of California Class Action Litigation 2000-2006: First Interim Report 15-16 (Mar. 2009), *available at* http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf.

In some cases the wait is interminable, or nearly so. In his study of class action settlements in federal court, Professor Brian Fitzpatrick found a consumer class action that took 4,961 days, or over thirteen years, to settle, and, similarly, a commercial class action involving Exxon retail dealers that took 5,443 days, or nearly fifteen years, to settle. *See* Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) (manuscript at 11-12 & tbl.2). These studies may actually understate the delay, because class recovery could be further delayed by the appeal of the approval of a class action settlement. *See generally* Fitzpatrick, 62 Vand. L. Rev. at 1624.

Because a "dollar today is worth more than a dollar tomorrow," *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 384 (1998) (quotation marks omitted), the loss of the time value of money is an affirmative harm,

see Habitat Educ. Center v. U.S. Forest Serv., 607 F.3d 453, 457 (7th Cir. 2010). And to the extent delay increases the class attorneys' ability to claim greater fees vis-à-vis the settlement fund, the delay harms class members by reducing their compensation. It is difficult to conclude consumers receive meaningful relief when they receive it years after they have suffered harm.

B. Obtaining Relief From Class Actions Involves Significant Transaction Costs

Even when class actions reach a final resolution that is favorable to consumers, it is still difficult for them to obtain recovery. This difficulty follows from structural inefficiencies in the class action mechanism.

There are two significant practical difficulties involved in delivering compensation to consumers. *First*, the administrator of the class settlement fund or class damages award must identify the class members and notify them of the settlement or favorable judgment. *See* Fed. R. Civ. P. 23(c)(2); Martin Redish et al., Cy Pres *Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010). But even when individual class members are identifiable by name, it may not be feasible to find current addresses for most of them. *See* Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 730-31 (2008). And although in theory publication notice may compensate for lack of individual notice, in practice it too is often ineffective or prohibitively ex-

pensive. *See id.* at 731-32. Therefore, the available data indicate that identifying and notifying absent class members of their right to recovery "will often prove to be both difficult and inefficient." Redish, 62 Fla. L. Rev. at 618; *accord* Klonoff, 69 U. Pitt. L. Rev. at 748.

Second, class members may have to decipher and complete a complex settlement notice and claim form in order to receive compensation under the class settlement. *See* Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 2, 119 Stat. 4, 4 (Feb. 18, 2005); *see also* S. Rep. No. 109-14, at 4 (2005) (Senate Report on CAFA). For example, the Federal Trade Commission ("FTC") objected to a recent class action settlement that not only "release[d] the claims of some 500,000 class members for, at best, pennies on the dollar," but also did so in a way that required consumers to fill out a detailed and confusing questionnaire to obtain relief and thus "appear[ed] purposefully designed to make it difficult for consumers to make claims." Intervener FTC's Mot. for Stay 1, 17-18, *Cass v. AmeriDebt, Inc.*, No. 01-CH-20350 (Ill. Cir. Ct. 2004), *available at* http://www.ftc.gov/os/2004/04/040412motion4stay.pdf.

Indeed, the incentives for class action attorneys and defendants encourage the creation of claims processes that make it prohibitively difficult for class members to make successful claims. As described further *infra* Part I.C, the structure of class actions encourages tacit collusion between class attorneys, who are trying to maximize the apparent value of the class settlement and thus their claim to fees, and defendants, who seek to minimize the costs of settlement. *See generally* John C. Coffee, Jr., *The Regu-*

lation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 883-84 (1987) ("The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery."). By agreeing to a settlement process that appears to provide meaningful relief, but in operation imposes obstacles to actual relief, class attorneys and defendants can maximize attorneys' fees and minimize settlement costs to their mutual benefit at the expense of the class members.[2] The creation of artificial obstacles to relief is all too common because "[t]he award to the class and the agreement on attorney fees represent a package deal" to defendants in class actions. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (describing class settlement).

Such transaction costs may explain the "modest to negligible" claims rates in small-claims class actions where the settlement requires class members affirmatively to file claims. *See, e.g.*, Deborah R.

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[2] In some cases, the complexity of a proposed settlement could lead to consumer harm. The FTC objected to the proposed settlement in *Chavez v. Netflix, Inc.* on this very ground, because the proposed relief was a "free one-month upgrade" combined with a "negative option plan" that meant that "new or upgraded service will continue automatically, and the member will be billed accordingly, unless he or she takes steps to cancel or modify the subscription." FTC's Mem. of Law as *Amicus Curiae* 2, No. CGC-04-0434884 (Cal. Super. Ct. Jan. 5, 2006), *available at* http://www.ftc.gov/os/2006/01/netflixamicusbrief.pdf. As the FTC explained, the negative option was "more of a promotional vehicle for Netflix than compensation for consumers." *Id.* at 10.

Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 459 (RAND Institute for Civil Justice 2000); Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 747 (1988) (class action "claims procedures are ill-suited" to ensuring class members obtain compensation); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008) (2,676 out of 10 million class members made claims); *Palamara v. Kings Family Rests.*, No. 07-317, 2008 WL 1818453, at *1-*3 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement). For many consumers in such circumstances, it is simply not worth the hassle to pursue their claims.

C. The Relief Provided In Class Actions Often Does Not Provide Meaningful Compensation To Class Members

Although most successful class action litigation under Rule 23 is resolved in the form of a class settlement, *see* Fitzpatrick, 62 Vand. L. Rev. at 1628 ("vast majority" of successful class actions "are terminated by settlement"), such class settlements frequently provide little or no meaningful compensation to consumers. Indeed, a significant number of consumer class settlements do not provide consumers with any monetary relief whatsoever. This systematic under-compensation is the product of two structural problems in class actions. *First*, because class attorneys' fees generally come from the same pool as the class members' compensation, class attorneys

settling class claims have a fundamental conflict of interest. *Second*, to the extent class attorneys exploit that conflict of interest, judges lack the necessary information to rectify self-dealing in most cases.

1. The principal reason for the failure of many class settlements to provide meaningful compensation is obvious: class attorneys have incentives to engage in self-dealing during the negotiation of class settlements, which often occur simultaneously with the negotiation of attorneys' fee payments. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1347-48 (1995); Coffee, 54 U. Chi. L. Rev. at 883-84; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7-8 (1991). Because class members, especially those in a small-claims consumer class action, have small stakes in the case and therefore usually do not closely monitor their attorneys' conduct, class attorneys often are able to obtain high fees without obtaining meaningful compensation for class members.[3] *See, e.g.*, Coffee, 54 U. Chi. L. Rev. at 883-84.

2. Indeed, all three branches of government have recognized this economic reality. In enacting the

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[3] In a now-classic study, Andrew Rosenfield demonstrated that a class attorney that settles a class action enjoys a "settlement premium" above the average attorney's fee awarded in a class action that proceeds to judgment. *See An Empirical Test of Class-Action Settlement*, 5 J. Legal Stud. 113, 115-17 (1976). This premium is consistent with the hypothesis developed above, *viz.*, that class attorneys will maximize their fees at the expense of the class members' compensation.

Class Action Fairness Act, Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while . . . class members [are left] with coupons or other awards of little or no value." CAFA, Pub. L. No. 109-2, § 2, 119 Stat. at 4; *see also* S. Rep. No. 109-14, at 33.

Similarly, the FTC has recognized that "[e]xcessive class action attorney fee awards represent a substantial source of consumer harm." R. Ted Cruz, Dir., Office of Policy Planning, FTC, Friend of the Court: The Federal Trade Commission's *Amicus* Program, Remarks Before the Antitrust Section of the American Bar Association 13 (Dec. 12, 2002), *available at* http://ftc.gov.speeches/other/tcamicus; *see also* Deborah Platt Majoras, Chairwoman, FTC, *Comments at the FTC Workshop: Protecting Consumer Interests in Class Actions* (Sept. 13, 2004), *in* 18 Geo. J. Legal Ethics 1161, 1162-63 (2005) (class actions may not "truly serve consumers' interests by providing them appropriate benefits"; encouraging "consumers to carefully scrutinize opt-out notices and class action settlement terms and particularly attorney fee awards that may reduce the total compensation available to consumers"). Indeed, the FTC has objected to class settlements that it has concluded do not adequately protect consumers from self-dealing by the class attorneys. *See* Cruz, Friend of the Court, at 13 ("Not infrequently, the interests of a private class action attorney may substantially diverge from the interests of the class.").

Courts also have recognized the harm to consumer welfare caused by the class attorney's conflict

of interest. *See generally* Fed. R. Civ. P. 23(e). As Judge Friendly put it, "a juicy bird in the hand is worth more than the vision of a much larger one in the bush." *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting). Or, in other words, "the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals" given the possibility that he may trade a small class award for the relative certainty of a high fee award. *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987).

3. The empirical evidence indicates that in a significant number of cases this conflict of interest leads to an inadequate class settlement. For example, the Senate Report to CAFA canvassed a number of cases that illustrate that "state court judges . . . readily approv[e] class action settlements that offer little — if any — meaningful recovery to the class members and simply transfer money from corporations to class counsel." S. Rep. No. 109-14, at 4, 33; *see also* John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1447-50 (2005) (presenting list of "abusive" class settlements). And the RAND study found that the class attorneys' fee awards were greater than the total cash payment to class members in the state-court consumer class actions that were examined. *See* Hensler, Class Action Dilemmas, at 14 (profiling case studies), 23 (presenting comparison of attorneys' fees with total cash payments). Although the same study cautioned that there is little evidence "that damage class actions *invariably* produce little

for class members," it also indicated that "class counsel were sometimes simply interested in finding a settlement price that the defendants would agree to" accept regardless of whether it adequately compensates the class members. *Id.* at 427 (emphasis added).

This risk of under-compensation may be particularly acute in consumer class actions. The Fitzpatrick study of federal class action settlements indicates that a higher proportion of consumer class actions than class actions in general are (i) certified as settlement classes or (ii) involve nonmonetary relief in whole or in part. Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) at 11, 15-16. More particularly, the study indicates that federal consumer class actions "were nearly three times as prevalent among settlement classes (15.9%) as non-settlement classes (5.9%)." *Id.* at 11. Settlement classes increase the risk of a "reverse auction" in which plaintiffs' attorneys compete to offer a defendant the lowest settlement price. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Penn. L. Rev. 1593, 1606 (2008); Coffee, 95 Colum. L. Rev. at 1370 (defining "reverse auction").[4]

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[4] This is not to say that class settlements always leave consumers without meaningful relief. A study of 688 federal class action settlements from 2006 to 2007 indicates that the mean and median attorneys' fees in such cases is generally around 25% of the settlement. Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) at 1. Similar figures have been cited to support the proposition that agency costs are not significant, and therefore there is not a significant risk of under-compensation for the class. *See, e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Penn. L. Rev. 103, 131-32

In addition, the Fitzpatrick study indicates that nonmonetary relief, which is less likely to compensate class members, may be more prevalent in consumer class actions. The study found that 26% of consumer class actions in the data set provided for no cash relief at all; 30% included in-kind relief, in the form of coupons, vouchers, and the like, as at least part of the relief granted; and 37% involved injunctive or declaratory relief of some sort. Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) at 16 tbl.3. These data are particularly troubling because consumers are far less likely to be adequately compensated by in-kind or injunctive relief. Two prominent examples of this problem are coupon and *cy pres* settlements.

Coupon settlements. It is easy to see why class attorneys and defendants may prefer coupon settlements. They can use coupons to inflate the apparent value of the proposed settlement by claiming that the coupons' nominal value is the actual value to the class members. *See* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & Contemp. Probs. 97, 108 (1997); *cf.* Daniel Fisher,

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(2006). But these data do not establish that proposition. That is because the "incentive problem arises from an asymmetry or inequality between (1) class counsel's effective share of a settlement he negotiates, and (2) his effective share of what the class members would receive if he did not negotiate a class settlement." Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 Hastings L.J. 479, 481 (1997). Accordingly, a "fee award that appears to be reasonable in absolute terms" may nevertheless "have the effect, ex ante, of encouraging the lawyer to agree to a settlement in the first place that is far smaller than what would be recovered (in expected terms) at trial." *Id.* at 482.

St. Louis Judge Hands Lawyers $21 Million For Coupons, Forbes.com On the Docket (June 23, 2010), *available at* http://blogs.forbes.com/docket/2010/06/23/st-louis-judge-hands-lawyers-21-million-for-coupons (Missouri class action settlement of $21 million for lawyers compared to $5 million in cash and $34 million in coupons for class).

Coupon settlements, however, suffer from several flaws, including that "they often do not provide meaningful compensation to class members." *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007); *see also In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001). Indeed, in general, "[c]ompensation in kind is worth less than cash of the same nominal value," *In re Mex. Money Transfer Litig.*, 267 F.3d at 748, particularly in the case of nontransferable coupons, *see, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 n.58 (D. Me. 2003). Moreover, coupons often include "restrictions intended to make redemption difficult." *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. Rev. 991, 995 (2002). Unsurprisingly, therefore, the redemption rate for a coupon without a secondary market is a miniscule 1% to 3%, and cases abound in which few class members redeem their coupons. *See, e.g.*, James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 572, 574 (N.C. App. 2008) (317 valid claims filed out of 1,500,000 member class, for total of $2,402 in total redemption of coupons as compared

to more than $1,000,000 in attorneys' fees and costs); *Union Fidelity Life Ins. Co. v. McCurdy*, 781 So.2d 186, 188 (Ala. 2000) (113 redemptions out of 104,000 member class); Jeff Feeley & Myron Levin, *Ford Accord Garners Less Than 1 Percent Participation*, Bloomberg (July 7, 2009) (75 coupons redeemed out of class of 1 million, while class attorneys received $25 million in fees and costs).

Although CAFA was in part designed to discourage the use of valueless coupons, *see* CAFA, Pub. L. No. 109-2, §§ 2-3, 119 Stat. 4, it does not apply to all class actions, and recent coupon settlements indicate that the problem persists. In the District of Columbia, a court recently approved a coupon settlement involving Envision EMI, an organizer of 2009 inauguration conferences. *See Radosti v. Envision EMI, LLC*, No. 09-887, 2010 WL 2292343 (D.D.C. June 8, 2010). According to the class complaint, 15,000 students paid more than $2,300 dollars to attend the conferences, but Envision EMI did not deliver what it promised. *Id.* at *2. The class settlement provides the class members with two $625 coupons to attend future Envision EMI conferences — with the possibility that class members will not be able to use their coupons to attend the conference of their choice, given that only 10% of seats at any given conference will be allowed to redeem coupons. *Id.* at *4. The court approved the settlement over the objection of several state attorneys general. *Id.* at *22. Thus, the coupons help Envision EMI stay in business and force the class members to deal with the same firm they allege failed to deliver a conference worth the more than $2,300 they paid to attend it.

Cy pres. To the extent that CAFA has undermined the use of coupon settlements as a means for class attorneys to increase their fees at the expense of consumers, new tactics have taken the place of coupons. Thus, although CAFA addresses some self-dealing, it has also created a game of "Whac-a-Mole" in which class attorneys have created new methods for collusion. *Cf.* Erichson, 156 U. Penn. L. Rev. at 1607 ("CAFA's Whac-a-Mole effect manifests itself in several ways.").

One such tactic is the use of *cy pres* class settlements. In its original context, courts used *cy pres* to "give effect to a testator's intent" when a specified charitable gift "had been rendered impossible or impracticable because of exigent circumstances" because *cy pres* allows the court to "put[] the funds to the next closest use." Redish, 62 Fla. L. Rev. at 625. In theory, *cy pres* is a solution to the problem that occurs when class members do not receive compensation because few members make a claim on the settlement fund or when allowing direct claims would be prohibitively expensive. *See id.* at 618-19; Theodore H. Frank, Cy Pres *Settlements*, Class Action Watch (Mar. 2008), at 1.

But in practice *cy pres* "creates the illusion of class compensation." Redish, 62 Fla. L. Rev. at 623. For example, the court may order the defendant to make a payment of goods or services to a third party charity while paying the class attorneys a fee — and the resulting benefits may redound only to the class attorney, the defendant, and the charity. *See, e.g.*, Coffee, 95 Colum. L. Rev. at 1368 (discussing *cy pres* settlement *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600 (D.N.J. 1994), which seemed a clever "way of"

allowing the defendant food producer "simultaneously" to "dispos[e] of both stale matzos and a difficult litigation"). Like coupon settlements, *cy pres* may be used to "disguis[e] the true cost of a settlement to a defendant to maximize the share of the actual recovery received by the plaintiffs' attorneys." Frank, Class Action Watch at 21.

Courts frequently enforce *cy pres* settlements, which is particularly troubling given that class attorneys "have recently shown renewed interest" in making use of them. Frank, Class Action Watch at 1; *see also* Coffee, 95 Colum. L. Rev. at 1369 ("courts have regularly accepted . . . *cy pres* settlements"). For example, the Center is currently litigating its appeal on behalf of class members in *Nachsin v. AOL*, in which the class members received no monetary benefit from the approved settlement, but there were $75,000 in *cy pres* awards and another $35,000 in separate donations to charities that are neither class members nor that have suffered any injury. *See* Br. for Objectors-Appellants 7-8, *Nachsin v. AOL*, No. 10-55129 (9th Cir. July 20, 2010), *available at* http://centerforclassactionfairness.blogspot.com/2010/07/ninth-circuit-appeal-over-cy-pres.html. In addition, one of the charities is an employer of one of the named plaintiffs, and the husband of the district court judge sits on the board of directors of another of the charities. *Id.*

In the Center's experience many class actions involve settlements in which the class attorneys receive fees that are disproportionate to the relief purportedly designed to benefit the class members. The Center represents consumers who have objected to the settlement *In re Bluetooth Headset Products Li-*

ability Litigation, which does not afford class members any monetary benefit but does provide for $100,000 in *cy pres* awards to charities and $850,000 in attorneys' fees. *See* Br. for Objectors-Appellants 6, *In re Bluetooth Headset Prods. Liab. Litig.*, No. 09-56683 (9th Cir. Apr. 26, 2010), *available at* http://centerforclassactionfairness.blogspot.com/2010/04/ninth-circuit-appeal-in-bluetooth.html; *see also* Daniel Fisher, *A Lawyer Who Tries to Block Settlements*, Forbes (Sept. 21, 2009). This type of rent-seeking by class attorneys is all too common and does not benefit class members.

Indeed, in some cases the problems of under-compensation and self-dealing are so severe that class settlements actually harm class members by putting them in a worse position than they were in before the litigation began. The CAFA Senate Report discusses two such cases, including the "infamous Bank of Boston class action settlement," in which an Alabama state court approved a settlement in which the attorneys' fees were subtracted from class members' escrow accounts, leading in many cases to class members losing money to pay the class attorneys' $8.5 million fee. S. Rep. No. 109-14, at 14 (citing *Kamilewicz v. Bank of Bos. Corp.*, 92 F.3d 506 (7th Cir. 1996)).

4. The problems arising from the class attorney's conflict of interest are inevitable, but courts do not have any effective means to police all abusive class settlements. Although courts are tasked with ensuring that class attorneys act as fiduciaries for the class as a whole, *see* Fed. R. Civ. P. 23(e), they often do not have the information necessary to measure whether the class attorney and defendant have ar-

rived at a fair settlement and accordingly cannot easily act to prevent attorney self-dealing. *See, e.g.*, Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 699 (1994); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. Rev. 1435, 1445 (2006). A court's comparative lack of information may explain the weight courts afford in reviewing class settlements to the "judgment of the parties," as presented by the attorneys, as to whether the settlement "is fair and reasonable." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). Given their conflict of interest, however, class attorneys' judgment cannot be expected to represent the class members' interests fairly in all cases. Therefore, there is a significant risk that judges will approve class settlements that do not provide meaningful relief to class plaintiffs, particularly when the class relief comes in the form of in-kind or injunctive remedies that are difficult to value.

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In sum, class actions are far from an exceptional means of affording consumers meaningful relief. Relief via class action is almost always untimely, recovering it involves significant transaction costs, and when consumers do obtain such relief, it is often less than they deserve. Thus, in many cases class actions prove particularly inadequate to the task of affording consumers access to meaningful relief.

II. INDIVIDUAL ARBITRATION MAY IN MANY CASES AFFORD CONSUMERS GREATER ACCESS TO MEANINGFUL RELIEF

While class actions are inefficient, typically involving protracted litigation over collateral issues, such as discovery and class certification, arbitration provides for a speedy resolution of claims and benefits consumers with small claims by reducing the costs of dispute resolution below their potential expected return. Thus, by comparison class actions are not exceptional and indeed in many cases are less effective than arbitration in providing consumers with meaningful relief.

A. The comparative efficiency of arbitration over class remedies and litigation is borne out by empirical evidence. "Virtually every study considering the issue has concluded that results in arbitration are far swifter than those in litigation." Peter Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 571 (2008) (reviewing empirical studies). For example, a recent study by the Searle Center found that "the average time from filing to final award for the consumer arbitrations studied was 6.9 months." Searle Civil Justice Center, Consumer Arbitration Before the American Arbitration Association: Executive Summary (Mar. 2009), *available at* http://www.searle arbitration.org/report/exec_summary.php. By contrast, federal class actions take more than 3 years on average to reach settlement. *See supra* 7. The cost of this delay is borne by the injured class members. *See supra* Part I.A; *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (recognizing that arbitration benefits "typical

consumer" because "costs and delays of" pursuing court remedy "could eat up the value of an eventual small recovery").

B. In addition to being more efficient, arbitration offers consumers rates of recovery that are comparable, and perhaps superior, to class actions. A survey of the empirical literature shows that "most measures — raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed — do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation." Rutledge, 6 Geo. J.L. & Pub. Pol'y at 560 (survey of empirical literature). Indeed, in many cases recovery rates in arbitration are likely to be more favorable to consumers than recovery rates in class actions. A 2007 report by the American Arbitration Association showed that approximately 60% of its consumer arbitrations were settled by mutual agreement or withdrawn; of the cases that reached decision, consumers prevailed 48% of the time when they brought the action. *See* American Arbitration Association, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload* (2007), *available at* http://www.adr.org/si.asp?id=5027. By contrast, 80% of putative consumer-initiated class actions are never certified, leaving the putative class in those cases with no recovery. Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 Notre Dame L. Rev. 591, 635-36 (2006). Of the remaining 20% of putative class actions that are certified, the vast majority settle. *See supra* 11. Class settlements, moreover, in many cases offer a particularly

ineffective vehicle for consumer recovery given the barriers to recovery and the dead-end problems discussed *supra* Part I. Arbitration agreements like AT&T M's have multiple features that are designed to avoid these types of problems and thus to provide consumers with a more realistic opportunity at recovery than class actions.

C. Consumers unsurprisingly prefer arbitration over litigation. In 2005, Harris Interactive surveyed 609 adults who had participated in some type of arbitration, finding that they reported several advantages of arbitration over litigation: 74% said it was faster, 63% said it was simpler, and 51% said it was cheaper than litigation. Harris Interactive, Arbitration: Simpler, Cheaper, and Faster Than Litigation ("Harris Interactive Survey") 5 (Apr. 2005), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf; *see also* Rutledge, 6 Geo. J.L. & Pub. Pol'y at 561. Nearly two thirds of those surveyed reported that it was likely they would arbitrate again, including one-third of those who had lost their claims. Harris Interactive Survey at 5. And a 2003 study by the American Bar Association of approximately 700 lawyers in its litigation section found that over 86% believed that arbitration was as or more cost-effective than litigation, with 75% reporting that the outcomes in arbitration were equal to or better than the outcomes in litigation. *See* ABA Section on Litigation Task Force on ADR Effectiveness, *Survey On Arbitration* Q9, Q13 (Aug. 2003), *available at* http://www.abanet.org/litigation/taskforce/adr/surveyreport.pdf; *see also* Rutledge, 6 Geo. J.L. & Pub. Pol'y at 561.

D. Thus, the Ninth Circuit's belief that consumers will not file claims in individual arbitration is incorrect. *See* Pet. App. 6a; *see also Discover Bank*, 113 P.3d at 1106. The Ninth Circuit failed to appreciate that individual arbitration can be structured in a way to encourage individuals with small claims to bring claims. *See* Jason Scott Johnson, *The Return of Bargain: An Economic Theory of How Standard Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 Mich. L. Rev. 857, 895 (2006) (arbitration provides a "realistic alternative" to class actions for resolving the "small loss" problem while "creat[ing] better incentives for firms to bargain to establish and maintain lasting, cooperative relationships with consumers and employees"). And AT&TM's arbitration agreement accomplishes this goal by making the initiation of the arbitration process convenient; by absolving the customer of all arbitration fees for non-frivolous claims; by disclaiming AT&TM's right to seek attorneys' fees against the customer, which eliminates another potential cost for customers seeking to bring a claim; and by including a clause guaranteeing the consumer a $7,500 minimum recovery if the arbitrator awards a customer relief that is greater than AT&TM's last written settlement offer made before an arbitrator was selected. This last clause provides the customer with some assurance that the arbitration process will yield meaningful results. By contrast, class actions provide no such assurances. Thus, far from being exceptional, class actions are inferior to consumer-friendly individual arbitration in providing consumers with meaningful relief.

III. THE MARKET PRICES COMPANIES' ATTEMPTS TO ADDRESS CONSUMER COMPLAINTS, SUCH AS THROUGH ARBITRATION AGREEMENTS, AS AFFILIATED SERVICES

Even assuming that class actions are in fact an exceptional remedy for consumers, there is no need for courts to prohibit consumer-friendly individual arbitration agreements. If class actions are more efficient at providing consumer relief than ATTM's arbitration agreement, then the market will make them available for two reasons. *First*, the perceived quality of a company's process for resolving customer complaints is reflected in brand image and loyalty, and thus a more efficient process leads to increased demand and the ability to command above-market prices. *Second*, the efficiency of complaint resolution processes results in cost savings that are passed along to consumers in the form of lower prices.

Customers implicitly take complaint resolution mechanisms into account when making purchasing decisions. Successful complaint resolution creates positive feelings in individuals towards a company, fostering loyalty and increasing the likelihood of repeat or continued business in individuals who otherwise had a negative experience. *See, e.g.*, Tor Wallin Andreassen, *What Drives Customer Loyalty with Complaint Resolution?*, 1 J. of Serv. Research 324, 329 (1999). Moreover, the quality of a company's complaint resolution is reflected in brand image and reputation, as customers share their experiences through positive recommendations or denigration. *See, e.g.*, Eugene W. Anderson, *Customer Satisfaction and Word of Mouth*, 1 J. of Serv. Research 5,

6, 15 (1998). Brand image and customer loyalty are significant drivers of purchasing decisions, allowing firms with loyal customers and positive brand image to charge a premium over their competitors. Frederick F. Reichheld & W. Earl Sasser, Jr., *Zero Defections: Quality Comes to Services*, 68 Harv. Bus. Rev. 105, 107 (1990).[5] Customers are thus, in effect, willing to pay a premium to purchase products and services from companies with effective complaint resolution mechanisms.

Moreover, to the extent that efficient complaint resolution processes reduce transaction costs for businesses in resolving complaints, these savings are passed along to consumers. *See, e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Dispute Resolution 89, 91 (2001); Rutledge, 6 Geo. J.L. & Pub. Pol'y at 579-81. This Court and other courts have recognized as much. *See, e.g.*, *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991); *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002). To the extent that individual arbitration can lower transaction costs compared to class action litigation and arbitration, customers will directly benefit. Customers may therefore choose companies offering efficient complaint resolution mechanisms in order to capture these cost savings.

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[5] Customer loyalty is a particularly strong predictor of firm success. Because existing customers bring increased business at lower costs, customer retention rates have a dramatic impact on a firm's bottom line. Reichheld & Sasser, 68 Harv. Bus. Rev. at 105 (finding that businesses retaining 5% more customers see 100% increase in profit).

The market already reflects complaint resolution through customer loyalty and pricing. Customers make purchasing decisions based on their personal preferences as to the balance of cost and quality of customer service, and reward companies that provide them with better service at lower prices. Allowing customers to select providers based on their preferences is not substantively unconscionable.

Thus, if class actions provide more efficient mechanisms for resolving consumers' complaints than ATTM's arbitration agreement, the market will take that into account when pricing ATTM's products. If, however, ATTM's consumer-friendly agreement is efficient, then ATTM will be able to pass the cost-savings along to consumers in the form of lower prices. In either instance, the market will, without aid from the courts, protect consumer welfare.

CONCLUSION

For the foregoing reasons, as well as those stated by the petitioners, the Court should reverse the decision of the court of appeals.

Respectfully submitted,

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AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates regularly employ agreements to arbitrate in their business contracts with their customers and employees. By agreeing to arbitrate with their counterparties, they avoid costly and time-consuming litigation when disputes arise. In its place, they adopt a dispute resolution mechanism that is speedy, fair, inexpensive, and effective. Based on the legislative policy reflected in the Federal Arbitration Act (FAA) and this Court's consistent endorsement of arbitration over the past several decades, Chamber members

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both petitioner and respondents have filed blanket consents to *amicus* briefs; the consents are reflected on the Court's docket.

have structured millions of contractual relationships around arbitration agreements.

A class-arbitration waiver is a key component of many Chamber members' arbitration agreements. Decisions like the opinion below, which invalidated a class-arbitration waiver, frustrate the parties' intent, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation. Because so many of the advantages of arbitration would be lost if the Ninth Circuit's decision were affirmed, the Chamber has a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FAA to stop courts from discriminating against arbitration agreements. Congress did so because it recognized that arbitration is a desirable alternative to more costly and time-consuming litigation. Here, petitioner AT&T Mobility LLC (ATTM) sought to avail itself of those benefits. The court below held that it could not do so, however, at least not unless ATTM also agreed to allow for class arbitration. The court said that class arbitration was necessary as a matter of California judicial policy, notwithstanding the FAA.

ATTM explains why the decision below disregards the FAA in practice, even if it pretends to adhere to it in form. The Chamber generally agrees with, and will not repeat, ATTM's arguments. This brief identifies further errors in the Ninth Circuit's reasoning.

I. The court below struck ATTM's class-arbitration waiver as unconscionable because the court thought

that class arbitration must be available to deter unlawful conduct. That reasoning is erroneous.

First, multiple factors—among them, the availability of other private remedies and the existence of robust public law enforcement authority—dramatically reduce the need for devices like class arbitration that allegedly provide further deterrence.

Second, insofar as a lingering need for deterrence remains, class arbitration does not provide it. Both logic and a wealth of empirical evidence make clear that the threat of class actions, whether through litigation or arbitration, does not discourage unlawful behavior.

Third, a predictable effect of forcing class arbitration on businesses (and consumers) that do not want it is to cause businesses to forgo arbitration entirely. At least for the many cases in which the requirements for class certification are not met, consumers will then have no place to turn but to prohibitively expensive litigation—or to abandon their claims in frustration.

II. The FAA preempts the attempted application of unconscionability doctrine in this case for at least four reasons. First, the decision below reflects the very hostility to arbitration that the FAA was enacted to counteract. Second, the specialized formulation of the unconscionability doctrine for cases involving class-action waivers in general, and this case in particular, is not a recognizable or defensible application of the general California law of unconscionability. Third, even if it were, the Ninth Circuit and California courts apply that formulation to dispute resolution contracts only, and not to all contracts, as the

courts must for the state law to come within the savings clause of Section 2 of the FAA.

Fourth, and overarchingly, by holding that there can be no arbitration that does not also allow for class arbitration, the decision below attacks the very purpose of the FAA: to provide parties a lower-cost alternative to litigation. Class arbitration is enormously more expensive and complex than traditional, bilateral arbitration. At a minimum, the FAA preempts state judicial rules that superimpose onto arbitration agreements a procedure (class arbitration) that is so "fundamental[ly]" and "crucial[ly]" different from bilateral arbitration that some businesses have already chosen to forgo arbitration entirely rather than submit to it. *Stolt-Nielsen S.A.* v. *Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010).

ARGUMENT

1. Class Arbitration Does Not Deter Misconduct, But Forces Consumers Into Costly Litigation

The court below held that the class-arbitration waiver to which AT&TM and respondents agreed was unconscionable because the court thought the provision was "in effect an exculpatory clause." Pet. App. 11a. The court reasoned that class arbitration must be available to deter businesses from "exact[ing] small sums from millions of consumers." *Id.* at 7a (internal quotation marks omitted).

That reasoning is erroneous. Logic and empirical evidence make clear that class actions do not deter unlawful behavior. Rather, the most likely effect of forcing class arbitration on companies is to cause them to abandon arbitration altogether, as Comcast

Corp., the nation's largest cable services provider, has already done. To the extent such abandonment occurs, consumers and employees will lose the many benefits of arbitration as they are herded into onerous litigation—or, more likely, at least for the many consumers and employees whose claims do not meet the stringent prerequisites for class certification, simply abandon their claims in frustration. The thinness of the Ninth Circuit's reasoning on this score, and of the California decisions on which the Ninth Circuit relied, suggests the true motivation for discriminating against class-arbitration waivers: the same hostility to arbitration agreements that Congress tried to eradicate more than 80 years ago and that this Court has sought to abolish ever since.

We elaborate these points below. We begin by observing that in this case the need for deterrence is minimal, and thus so is the benefit to be had from any additional deterrent device.

A. There Are More Important Deterrents To Unlawful Conduct Than Class Actions

The primary function of private civil litigation is compensation of injured plaintiffs. The primary function of class actions is the same: properly certified and circumscribed class actions enable plaintiffs to litigate "a suit involving common questions when there are too many plaintiffs for proper joinder." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985).

Deterrence is a secondary function of private civil litigation, but the American legal system has other mechanisms for achieving deterrence as their *primary* purpose. Severe corporate misconduct has been subjected to criminal sanctions. Criminal law aside,

the American legal system has a host of mechanisms for *public* pursuit and punishment of corporate misconduct. One of the laws at issue in this case, for example, empowers the state Attorney General and local prosecutors to enforce the law through civil penalties and injunctive relief. See CAL. BUS. & PROF. CODE §§ 17204, 17206. In addition, federal regulators such as the Federal Trade Commission and Federal Communications Commission have multiple tools to protect consumers from unscrupulous practices by businesses in general and telecommunications companies in particular. See, *e.g.*, Federal Trade Commission Act § 5, 15 U.S.C. § 45(a) (allowing FTC to take action against "unfair or deceptive acts or practices" in interstate commerce); 47 U.S.C. § 201(b) (allowing FCC to define and prohibit "unjust or unreasonable" practices by carriers).

State and federal law enforcement authority are powerful deterrents of unlawful conduct. See, *e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (state law enforcement mechanisms "further tend[] to show" that class-arbitration waivers do "not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability"); cf. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991) (rejecting argument that arbitration in lieu of agency proceedings would undermine the role of the EEOC in enforcing the Age Discrimination in Employment Act of 1967); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002) (similar). Because these other public law-enforcement mechanisms exist, private parties are free to resolve their disputes through alternative arrangements, unless "Congress itself has evinced an

intention to preclude" them from doing so. *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted).

B. Class Arbitration Does Not Deter Misconduct

The court below thought that class arbitration will deter unlawful behavior by increasing the liability a defendant faces for committing such misconduct. See Pet. App. 7a. That analysis ignores the practical financial incentives that govern plaintiffs, defendants, and their lawyers.

Litigation is enormously expensive to businesses because of the cost of discovery and related distractions and lost business opportunities. That is true of individual lawsuits alone. But, if the action is brought on behalf of not one plaintiff but hundreds or thousands or more, the stakes skyrocket. Whether the forum is arbitral or judicial, once a class is certified an action that individually might be worth only a few hundred dollars or less can instantly metastasize into a potentially catastrophic judgment of hundreds of millions or even billions of dollars of damages. Defendants will almost inevitably settle in those circumstances. See, *e.g.*, Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized."); see also *id.* at 1546 (observing that class certification "has a huge impact on the subsequent course of the litigation").

That observation might be consistent with the Ninth Circuit's idea that class actions deter misconduct *if* there were a high correlation between the merits of a plaintiff's claim and a defendant's decision to settle. But there is not, for the same reasons described above. Defendants have a financial incentive to settle class actions even when the plaintiff's claim has little or no merit. Basic mathematics and risk aversion make it so: Attorneys' fees aside, a risk-averse defendant that thinks it has a 90 percent chance of defeating a $100 million class action is still better off settling for $9.9 million. The result is an *in terrorem* effect that compels defendants to settle claims that have no merit. See, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims.").[2] The pressure to settle is only amplified when the class action is an arbitration, and the company's fate is committed to an arbitrator whose decisions are subject to review that is "among the nar-

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[2] Echoing Judge Friendly, distinguished jurists have lamented these "blackmail settlements." See, *e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); see also Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999) ("[T]he specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases, with the settlement often including substantial attorneys' fees for the class lawyers.").

rowest known to law." *Dominion Video Satellite, Inc.* v. *EchoStar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted).

Plaintiffs and their lawyers obviously know this, and they adapt their behavior accordingly. So long as defendants are likely to settle litigation or arbitration whenever a class is certified, plaintiffs' lawyers have an incentive to seek such certification, even if their clients deserve no compensation. See, *e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291–1292 (2002) (observing "what most class action lawyers know to be true: almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision").

Plaintiffs' lawyers have wasted no time in taking advantage of California's refusal to enforce class-arbitration waivers. Already, they have persuaded the Ninth Circuit not to enforce Texas law, which upholds class-action waivers, see Pet. App. 68a, even though Texas law was explicitly provided for in a choice-of-law clause to which all the parties agreed. See *Omstead* v. *Dell, Inc.*, 594 F.3d 1081, 1083, 1086 (9th Cir. 2010) (choice-of-law provision is unenforceable in part because "application of [Texas] law would be contrary to a fundamental policy of California because the sales agreement's class action waiver was unconscionable under California law"). *Omstead* at least involved a class of California plaintiffs objecting to the application of another State's law. See *id.* at 1083 n1. But forum-shopping counsel have been audacious enough to bring class actions in California on behalf of *non-California residents* whose *home States would have compelled arbitration*—and, what is more, the lawyers have done so with success. See,

e.g., *Masters* v. *DirecTV, Inc.*, Nos. 08-55825, 08-55830, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009) (unpublished).

Taken together, these incentives nullify whatever deterrent effect a class device might have. If, from a defendant's perspective, it will face class arbitration and be forced to settle *regardless* of whether it acts unlawfully, then the defendant has no financial incentive to alter its behavior one way or the other. See, *e.g.*, A. MITCHELL POLINSKY & STEVEN SHAVELL, *The Theory Of Public Enforcement of Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 404, 427 (2007). In fact, as discussed later, see *infra* I.C, a defendant has an affirmative ***dis***incentive to invest in arbitration at all, in light of the great costs and few benefits to it of class arbitration.

The empirical literature bears these observations out. One respected study of securities class actions from the Stanford Law Review concluded that the chief determinants of whether plaintiffs would bring suit, and the size of the resulting settlements, were the decline in a defendant's stock price and the amount of the defendant's insurance coverage. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516-519 (1991). By contrast, the merits of the plaintiff's underlying suit had little effect on the defendant's decision to settle. *Ibid.* Other studies have found similar results. See, *e.g.*, Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 287 n.98 (2005); James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979-980 (1996); Joseph A. Grundfest, *Why*

Disimply?, 108 HARV. L. REV. 727, 742–743 (1995). This case involves a consumer class action and not a securities class action, and the stakes are perhaps lower, but the underlying logic is the same because in each case the risk of a judgment large in comparison to the profitability of the challenged activity creates a powerful incentive to settle even unmeritorious suits. Indeed, because defense costs tend to be a smaller fraction of the potential damages at stake in a case seeking enormous class damages than in a case seeking lesser class damages, defendants may have even more of an incentive to settle the lesser cases.

The decision below addresses none of these points. It does not explain why these predictable incentives will not cause plaintiffs to bring class actions—and defendants to settle them—even when the actions have no merit. Nor does it rebut empirical findings like those above. The decision does not, for that matter, consult *any* empirical evidence, even though the question whether class arbitration deters misconduct is amenable to empirical study. Instead, the court merely speculated that, if the amount of liability is large enough, defendants will engage in a smaller amount of unlawful behavior. The conclusion simply does not follow from the premise.

C. The Decision Below Will Cause Many Businesses To Abandon Arbitration Altogether, Forcing Consumers To Litigate Or Give Up Their Claims

Few companies will bind themselves to agreements that allow for class arbitration when the companies can simply abandon arbitration altogether instead. Whereas individual arbitration simplifies, speeds, and reduces expense, class arbitration com-

plicates, slows, and increases expense. Class arbitration does so to such a degree, moreover, that its costs dwarf the benefits of individual arbitration. Businesses will likely forgo arbitration entirely before they will choose to suffer class arbitration. Consumers will then have no option but to litigate their claims or to give up.

1. The virtues of individual (*i.e.*, bilateral) arbitration have been lauded frequently by scholars, practitioners, Congress, and courts, particularly this Court. Above all, arbitration gives consumers "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280–281 (1995); *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1464 (2009) (same); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (same). Its streamlined procedures minimize the "delays, expense, uncertainties, loss of control, * * * and animosities that frequently accompany litigation." Y2K Act, Pub. L. No. 106-37, §§ 2(a)(3)(B)(iv), 2(b)(3), 113 Stat. 185, 186–187 (1999) (encouraging businesses and users of technology to use "alternative dispute mechanisms" to avoid "costly and time-consuming litigation"); see also *Stolt-Nielsen*, 130 S. Ct. at 1775 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

In addition, consumers tend to "fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the June-*

ture of Mandatory Arbitration Agreements and Class Action Lawsuits, 57 STAN. L. REV. 1677, 1712 (2005). It is not surprising, then, that consumers—as opposed to the plaintiffs' bar and certain courts—have largely been satisfied with arbitration as an alternative to litigation. See Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 24–28 (2005), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf.

Not so with class arbitration. It shares with individual arbitration a name only. The differences are "fundamental" and "crucial." *Stolt-Nielsen*, 130 S. Ct. at 1776.

An arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. With more people come more rules. The American Arbitration Association's (AAA) rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. See AAA, Supplementary Rules for Class Arbitrations, *available at* http://www.adr.org/sp.asp?id=21936. For example, class arbitration demands the same onerous class certification determinations that class litigation requires. See *id.* at Rules 4–5. Class arbitrations can thus be just as time-consuming, procedurally complex, and expensive as traditional class litigation—perhaps even more so, because once a class determination is made the arbitrator "shall" stay all proceedings "for a period of at least 30 days to permit any party to move a court * * * to confirm or to vacate" the decision. *Id.* at Rule 5(d). And, under the AAA rules, "the presumption of privacy and confidentiality

that applies in many bilateral arbitrations shall not apply in class arbitrations." *Stolt-Nielsen*, 130 S. Ct. at 1776 (internal quotation marks omitted); see AAA Supplementary Rules at Rule 9(a). Just last Term, those differences led this Court to conclude that "class-action arbitration changes the nature of arbitration to such a degree" that one cannot presume that parties have consented to it without affirmative evidence. *Stolt-Nielsen*, 130 S. Ct. at 1775.

Cost and complexity aside, what makes class arbitration truly intolerable to many businesses is the nature of the adverse judgments it can produce. Like class litigation, class arbitration can cripple a business with a gargantuan judgment. But unlike class litigation, where appellate review of a court's certification and merits decisions is robust, the standard for vacating an arbitrator's decision is "among the narrowest known to law." *Dominion Video Satellite, Inc.*, 430 F.3d at 1275 (internal quotation marks omitted); see also *Stolt-Nielsen*, 130 S. Ct. at 1776 ("[T]he commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited." (citation omitted)); *id.* at 1767 (an arbitrator's decision will not be overturned unless the arbitrator "effectively 'dispense[s] his own brand of industrial justice'").

Even if a business defeats a class arbitration, there is no guarantee that the judgment will have the same preclusive effect that it would have in class litigation. Among other reasons, nonparticipating consumers can argue colorably that they cannot be bound by a decision of an arbitrator whom they had no say in choosing. See generally Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class*

Action, Will the Class Action Survive?, 42 WM. & MARY L. REV. 1, 113 (2000); see also Edward K.M. Bilich, *Consumer Arbitration: A Class Action Panacea?*, 7 CLASS ACTION LITIG. REP. (BNA) 768, 771 (2006) (class arbitration proceedings may not bind all class members because of the "deferential standard of review" applied to arbitrators' decisions). On nearly every dimension, then, class arbitration has the costs but not the benefits of individual arbitration.

Given the choice, businesses will likely forgo arbitration entirely before they will suffer class arbitration. Comcast Corp., the country's largest cable company, has already done so. It generally refuses to allow any of its California customers to arbitrate, *even if* the customers would have done so individually and not as a class. See Comcast Agreement for Residential Services § 13.k, *available at* http://www.comcast.net/terms/subscriber/ ("**SPECIAL NOTE REGARDING ARBITRATION FOR CALIFORNIA CUSTOMERS:** IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE.") (emphasis in original).[3] Other large and important companies that deal with consumers are poised to do the same. Both Verizon[4]

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[3] See also *Kristian* v. *Comcast Corp.*, 469 F. Supp. 2d 1, 1 (D. Mass. 2006) (Comcast declines to arbitrate after the court of appeals struck its class-action waiver but allowed Comcast to withdraw from arbitration).

[4] Verizon Wireless Service Agreement, *available at* http://www.verizonwireless.com/text-01/CUSTOMER_AGREEMENT/footer_customerAgreement.jsp.shtml ("**[i]f for some reason the prohibition on class arbitrations * * * cannot be enforced, then the agreement to arbitrate will not apply.**") (emphasis in original).

and Sprint,[5] for example, include nonseverability clauses in their arbitration agreements that declare the entire agreement inapplicable if the class-waiver provision is deemed unenforceable. It is a short step from such provisions to Comcast's blanket ban on arbitration for all California customers.

The companies listed above are just a handful in the telecommunications business. We should expect the same flight from arbitration in the many other industries that rely on bilateral arbitration to minimize their dispute resolution costs, including credit, brokerage, insurance, financial services, legal, accounting, health care services, and still others. Like Sprint's and Verizon's, for example, American Express's Cardmember Agreement states that "THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS," and that, "should any portion of this Restrictions on Arbitration subsection be deemed invalid or unenforceable, then the entire Arbitration provision * * * shall not apply."[6]

2. Without the ability to resolve disputes efficiently through bilateral arbitration, consumers will

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[5] Sprint Terms & Conditions, *available at* http://shop.sprint.com/en/legal/legal_terms_privacy_popup.shtml ("**If for any reason any court or arbitrator holds that this restriction [against class arbitration] is unconscionable or unenforceable, then our agreement to arbitrate doesn't apply and the dispute must be brought in court.**") (emphasis in original).

[6] American Express Cardmember Agreement, Delta SkyMiles Credit Card, *available at* https://secure.emax.americanexpress.com/Internet/UDAP/CardMemberAgreementsOnline/US_en/CMADetailsPage/PersonalCards/DeltaSkyMiles/DeltaSkyMiles.pdf.

lose at least as much as businesses will, probably more. Consumers have no other realistic place to turn. Surely class *litigation* is not the answer. To begin with, the door is tough to open. Even though courts continue to certify many class actions that should not be certified—see, *e.g.*, *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 628 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting)—the fact remains that only 20% of putative classes are certified. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 635–636 (2006); Judicial Council of California, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation* 5 (2010), *available at* http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf. Certification is not allowed unless "the trial court is satisfied[] after a rigorous analysis" that common questions of law and fact predominate over questions affecting only individual members. *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982). Most consumer claims that could have been arbitrated will not survive the trial court's "close look." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997) (internal quotation marks omitted).

Even if they do, the consumer—as opposed to her attorney—is unlikely to see any money. Class-action litigation can drag on for years in pursuit of "relatively paltry potential [individual] recoveries." *Amchem*, 521 U.S. at 617 (internal quotation marks omitted). This may be why Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of 2005, Pub. L. No. 109-2,

§ 2(a)(3), 119 Stat. 4. Lawyer fees, on the other hand, usually consume a large chunk of a class's recovery. As the district court observed, "class members rarely receive more than pennies on the dollar for their claims, and * * * few class members (approximately 1–3%) bother to file a claim when the amount they would receive is small." Pet. App. 41a.

Or the recovery might not entail any money for consumers at all. Coupon-based settlements, in which consumers receive vouchers redeemable for goods or services in lieu of cash, have grown common in consumer class actions. See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 993–994 (2002). But restrictions on consumers' ability to redeem the coupons can reduce the value of these settlements dramatically. See *id.* at 996. Congress tried to close this loophole in the Class Action Fairness Act, but failed. See, *e.g.*, Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1873–1874 (2008); Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1698–1705 (2006).

The only people who are almost sure to profit from class actions are the attorneys who bring them. See, *e.g.*, 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("The class action judicial system has become a joke, and no one is laughing except the trial lawyers * * * all the way to the bank." (internal quotation marks omitted)); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1189

(2009) ("In some settlements, such as 'coupon' settlements, * * * class counsel receive large fees while class members receive little or nothing of actual value."). Class counsel and defendants each have an incentive to settle on terms that may be unfavorable to the plaintiff consumers but reap large fees to counsel. See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 168 (1997) ("Particularly problematic is the possibility that class action litigation will produce handsome compensation for class counsel but little discernible benefit for class members."); see also, *e.g.*, *Mirfasihi* v. *Fleet Mortgage Corp.*, 356 F.3d 781, 783, 785 (7th Cir. 2004) (class of 1.4 million customers settled for less than $2.5 million).

With class litigation often a dead end, and businesses likely unwilling to arbitrate under California's terms, consumers will have nowhere to turn but to individual litigation. But in small-stakes cases, other than those amenable to litigation in small claims court, such litigation is also a dead end. As one court colorfully put it, "only a lunatic or a fanatic sues for $30." *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Because of the decision below, meritorious claims that could have been arbitrated—and, under AT&TM's agreement, would likely have been compensated in full or more, see Pet. App. 39a—will go unprosecuted. In exchange, consumers will receive only a device that does not deter unlawful conduct and that, in any event, businesses will almost surely reject, as they are entitled to do.

II. California's Manipulation Of Unconscionability Doctrine To Invalidate AT&TM's Class-Arbitration Waiver Is Preempted By The FAA

1. Ironically, and perversely, for the reasons given above the Ninth Circuit's insistence on superimposing California's public policy will do no more than send consumers right back where they were almost a century ago, before Congress enacted the FAA to avoid this very scenario. That may ultimately be the underlying motivation for the California and Ninth Circuit decisions that have caused the issue in the present case to come before this Court.

It is no secret that, despite the FAA and this Court's repeated admonitions, some lower courts still harbor prejudice against arbitration. See, *e.g.*, Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186 (2004) ("[J]udges find unconscionable specific features of arbitration agreements, such as forum selection clauses and confidentiality requirements, which are routinely enforced as unobjectionable in nonarbitration agreements."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1034 (1996) ("Judicial decisions apply unconscionability, and other common law doctrines, more aggressively to arbitration agreements than to other contracts."). Moreover, evidence suggests that the prejudice may be geographically concentrated. See Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 62 ("California has created a

new brand of unconscionability. It is far more demanding—and it is unique to arbitration.").[7]

Whatever the reason for the prejudice, the FAA explicitly proscribes it. 9 U.S.C. § 2 (an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). It is no absolution under the FAA for a court to obscure its prejudice beneath the veneer that class arbitration deters misconduct, especially when the foreseeable price of that feeble deterrent is to cause businesses to give up arbitration entirely. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122 (2001) (courts may not "chip away at [the FAA] by indirection"). California's jerry-built unconscionability doctrine for class-arbitration waivers runs afoul of Congress's "liberal federal policy favoring arbitration agreements," *Waffle House, Inc.*, 534 U.S. at 289 (internal quotation marks omitted), and this Court's admonition that States may *not* "decide that a contract is fair enough to enforce all its basic terms * * * but not fair enough to enforce its arbitration clause," *Allied-Bruce*, 513 U.S. at 281. The decision below does exactly that and is therefore preempted by the FAA.

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[7] In contrast to their practice twenty years ago, courts—especially California courts—are now nearly twice as likely to find arbitration agreements unconscionable as they are any other contract. See Randall, *supra*, 52 BUFF. L. REV. at 187; see also Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 39 (2006) ("While in most jurisdictions the judiciary has long abandoned its historical hostility to arbitration as an alternative to litigation, * * * in California the courts continue to view arbitration agreements critically.").

2. Even aside from the motivation of the courts that have adopted and applied the rule of *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1103 (Cal. 2005), the rule is preempted by the FAA because it is not a rule applicable to all contracts generally. Although cast as "simply a refinement of the unconscionability analysis applicable to contracts generally in California," Pet. App. 12a–13a (quoting *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)), the *Discover Bank* rule distorts the traditional analysis profoundly.

In place of the usual substantive unconscionability test, the California courts have substituted a test crafted specifically to deal with class-action waivers in arbitration agreements, and the Ninth Circuit has followed it. See Pet. App. 4a–11a. The cases in this line are irreconcilable with Section 2 of the FAA and this Court's cases interpreting it, which permit the invalidation of agreements to arbitrate only "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

Unconscionability is, "by its very nature, vaguely defined," McGuinness & Karr, *supra*, 2005 J. DISP. RESOL. at 74 (citing JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION § 29.1 (rev. ed. 2002)), but there are limits to the doctrine's reach. Ordinarily, to find a contract unconscionable, California courts require some combination of "procedural" and "substantive" unconscionability. *Discover Bank*, 113 P.3d at 1108; see also Randall, *supra*, 52 BUFF. L. REV. at 191 (observing that, according to the Uniform Commercial Code, "[c]ourts generally recognize two types of unconscionability * * * and may re-

quire the presence of both in order to find a particular agreement unconscionable").

Substantive unconscionability (the kind at issue here) "focuses on the actual terms of the agreement and evaluates whether they create 'overly harsh' or 'one-sided' results as to 'shock the conscience.'" *Aron* v. *U-Haul Co.*, 49 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2006); accord *Discover Bank*, 113 P.3d at 1108 (observing that the substantive unconscionability test focuses on "overly harsh" or "one-sided" results). In California, as elsewhere, an unconscionable bargain is one such as "no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other." *Odell* v. *Moss*, 62 P. 555, 557 (Cal. 1900) (quoting 1 Story, *Eq. Jur.* §§ 244, *et seq.*); accord *Cal. Grocers Ass'n* v. *Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Cal. Ct. App. 1994).

Despite these established principles, California courts and the Ninth Circuit have invoked substantive unconscionability to invalidate arbitration agreements on the basis of the class-action waivers contained in those agreements, even when it is clear that the waivers inflict no harm on the parties appearing before the court. To reach that result, the courts have applied California's *Discover Bank* rule, which was articulated for the first time by the California Supreme Court in a 2005 case addressing "the unconscionability of class action waivers in arbitration agreements." Pet. App. 5a.

Under the *Discover Bank* rule, the unconscionability of class-arbitration waivers turns not on their harshness or one-sidedness, but on three different factors, including whether it is "alleged that the party

with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money." Pet. App. 7a.[8] When such allegations have been made, California courts say, invalidation of class-arbitration waivers is necessary to deter companies from adopting policies that inflict small injuries on many people; when each injury is too small for an individual to bother pursuing, the "unscrupulous wrongdoer" will pocket "the benefits of its wrongful conduct." *Discover Bank*, 113 P.3d at 1106, 1108; see also Pet. App. 46a.

That rationale is wrong for all the reasons stated earlier in this brief. In any event, regardless of the proffered rationale, it is clear that the California courts are not invalidating class-arbitration waivers because they are "harsh" or "oppressive" to the contracting parties. As this case demonstrates, courts following the *Discover Bank* rule will invalidate the waivers even when the terms are admittedly those a reasonable person would want. See Pet. App. 4a–5a, 42a (invalidating AT&TM's arbitration agreement because of its class-arbitration waiver even though the district court found that consumers "may well prefer" arbitration to a class action). At least with regard to class-action waivers, then, it seems "California has created a new brand of unconscionability," one that is "far more demanding" than the norm and "unique to

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[8] Courts applying the *Discover Bank* rule also consider whether the agreement is a contract of adhesion and whether disputes between the contracting parties are "likely to involve small amounts of damages." Pet. App. 7a. The Ninth Circuit has suggested that class-action waivers may be unconscionable even if they do not satisfy all three parts of the *Discover Bank* test. See *ibid.*

arbitration." McGuinness & Karr, *supra*, 2005 J. DISP. RESOL. at 62; see also Broome, *supra*, 3 HASTINGS BUS. L.J. at 39–40 ("Although ostensibly applying the 'generally applicable' contract defense of unconscionability, in cases involving the validity of arbitration agreements the California courts routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration.").

3. Under the FAA, arbitration agreements must be enforced and interpreted under the same principles of contract law applicable to contracts generally, placing arbitration agreements "upon the same footing as other contracts." *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) (internal quotation marks omitted). For a state contract principle to override an arbitration agreement, it is insufficient that it avoids overt discrimination against arbitration; it must apply universally to "any" and every contract. This means courts may invalidate class-action waivers in arbitration agreements as unconscionable only if they have subjected the waivers to the same unconscionability analysis they would have applied to the terms of any other contract. See *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

The unconscionability standard that the Ninth Circuit and California courts employ against class-action waivers is not a ground for the invalidation of "any" contract, as Section 2 of the FAA requires, but rather a rule applicable only to the subset of contracts that concern resolution of disputes. When parties agree to arbitrate, they agree to resolve any future differences out of court. And when California changes the rules of unconscionability governing agreements to resolve disputes out of court—here by

looking beyond the parties before the court to find unconscionability—it changes the rules of unconscionability that govern arbitration agreements.

That is precisely what the FAA prohibits. There is nothing objectionable about saying that a provision of an arbitration agreement may be invalidated because it is unconscionable under state law. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686 (1996). The *ad hoc* manipulation of unconscionability doctrine, however, is inconsistent with this Court's admonition that state-law contract defenses may be used to void arbitration provisions only if they "arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added).

4. We add one further point. An overarching problem with the decision below is that the particular rule the court imposed—that there can be no arbitration unless there is also class arbitration—attacks the very core of what arbitration is. The only reason businesses choose to arbitrate is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.*, 473 U.S. at 628. Hence "parties may specify *with whom* they choose to arbitrate their disputes." *Stolt-Nielsen*, 130 S. Ct. at 1774 (emphasis in original). To force on businesses and consumers "crucial[ly]" different procedures that inflict the costs and complexity of litigation is to shove them into exactly the forum that the FAA lets them avoid. *Id.* at 1776.

So it is no defense for the court below to say that its prohibition against class waivers is lawful merely because the prohibition might in theory apply to liti-

gation, too. The very comparison is inappropriate. Our point is precisely that class arbitration makes arbitration too *similar* to litigation. Claiming that the rule applies equally to litigation is therefore no response. If the FAA stands for anything, it must be that a court cannot impose a rule that so "fundamental[ly]" and "crucial[ly]" changes the nature of arbitration that several major businesses have already determined that they will give up arbitration entirely before they will accept the rule. *Stolt-Nielsen*, 130 S. Ct. at 1776; see also *id.* at 1769 n.7 (rejecting the same argument the California courts and the Ninth Circuit invoked in invalidating the parties' class action waiver—namely, that class arbitration is necessary as a matter of public policy given the small value of plaintiffs' individual claims).[9]

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[9] Another way to view the issue is from the perspective of the Congress that enacted the FAA in 1925. At that time, the only arbitration agreements that existed were bilateral ones. See *Discover Bank*, 113 P.3d at 1110 ("[N]ot only is classwide arbitration a relatively recent development, but class action litigation for damages was for the most part unknown in federal jurisdictions at the time the FAA was enacted in 1925.") The decision below explicitly outlaws such agreements by striking them unless they further permit class arbitration. In other words, the decision below invalidates exactly the type of agreement—bilateral arbitration—that the enacting Congress necessarily had in mind, and sought to protect, when it enacted the FAA. See generally David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55 (2007).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 09-893

In The

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT and LIZA CONCEPCION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CIVIL PROCEDURE AND COMPLEX LITIGATION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The law professors named below teach and write about civil procedure and class action law. *Amici* are among the many scholars who have spent a considerable amount of time thinking, writing, and teaching about the issues before the Court. A partial list of their scholarship on these issues appears as an Appendix. Based on this expertise, and on careful review of this Court's decisions, *amici* argue that class actions serve critical social functions (Part I, *infra*) and that Petitioner and its *amici* have not presented a balanced picture of those functions in their briefs (Parts II & III, *infra*). *Amici* respectfully submit this brief so as to present to this Court a more balanced view of class action law and its importance within the American litigation framework.[1]

SUMMARY OF ARGUMENT

The contract in this case requires consumers to arbitrate disputes but prohibits class-wide arbitration. The lower courts found the class action ban unconscionable under California law. The question presented is whether the Federal Arbitration Act

[1] All of the parties in this case have consented to the filing of this brief. No counsel for any party to this case authored any part of this brief and, other than *amici* on whose behalf this brief is submitted and their counsel, no person or entity contributed money or services to the preparation and submission of this brief.

pre-empts the application of California's unconscionability doctrine in this context. If it does, companies could include class action bans in their contracts, effectively insulating themselves from class actions and limiting consumers with whom they deal to individual arbitrations.

Petitioner and its *amici* argue that the policy ramifications of this are salutary. They identify a series of purported problems with class actions and extrapolate to the conclusion that banning this procedural device is not only unproblematic but pro-consumer.

This characterization ignores nearly a half-century of this Court's jurisprudence and presents a skewed picture of class actions. The goal of this brief is to present a more balanced picture of the purposes of class actions than that presented by Petitioner and its *amici*. Part I does so by reviewing this Court's class action jurisprudence. That long-standing body of case law has recognized that class actions serve at least three important functions: compensation, deterrence, and efficiency. Class action practice is not without its problems, but few commentators short of Petitioner and its *amici* are prepared to throw the baby out with the bath water.

Parts II and III respond to the specific arguments that Petitioner's *amici* present against class actions. Part II addresses the Center for Class Action Fairness's contention that individual arbitration provides a better means of compensating consumers than class

actions. *Amici* show that the Center's brief offers no real support for this conclusion and that, in fact, the opposite conclusion is warranted – class actions are a far more comprehensive and efficient means of providing compensation to large groups of consumers, particularly in small claims situations, than is individual arbitration.

Part III addresses the Chamber of Commerce's argument that class actions do not deter wrongdoing. *Amici* show that the Chamber's brief offers no real support for this conclusion and that, in fact, the opposite conclusion is warranted – class actions are a far more comprehensive and efficient means of deterring wrongdoing, particularly in small claims situations, than is individual arbitration.

Taken together, the three Parts of this brief demonstrate that class actions serve important functions and that a rule enabling corporations to evade class-wide adjudication would have harmful public policy consequences.

ARGUMENT

I. CLASS ACTIONS SERVE IMPORTANT FUNCTIONS

The 1966 amendments to the Federal Rules of Civil Procedure introduced a new class action rule. In the succeeding 44 years, this Court has regularly acknowledged that class actions serve at least three critical functions: compensation, deterrence, and administrative efficiency.

A. Class Actions Provide A Means Of Individual Compensation

Nearly 40 years ago, this Court stated that where individual claims are for small amounts of money, the class action device is often the sole means by which individuals may receive compensation:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. ***Economic reality dictates that petitioner's suit proceed as a class action or not at all.***

See Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 161 (1974) (emphasis added). Class actions further compensatory goals in a variety of ways.

1. *Class Actions Further Compensatory Goals By Enabling Litigation.* As this Court recognized in

Eisen, individuals have no practical means of bringing suit to be compensated for small harms because the cost of the lawsuit outweighs their individual recovery. The class action device solves this problem by aggregating many individual claims into a single suit and distributing the costs of representation across the entire claimant group. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

This Court has long recognized that, absent the class action device, a dispersed group of individual claimants typically will not be compensated for small harms:

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Roper v. Deposit Guar. Nat'l Bank, 445 U.S. 326, 339 (1980).

2. *Class Actions Further Compensatory Goals By Creating Equal Incentives Between Plaintiffs and Defendants.* Even if one individual in a class has sufficient incentive to fund litigation, she nonetheless faces a significant disadvantage against a defendant that has harmed a large group of individuals. The defendant has massive resources and, because it potentially faces many similar claims, a disproportionate incentive to use those resources

against the single plaintiff. The individual plaintiff is therefore systematically disadvantaged in developing her case.[2] This is particularly problematic because:

> The type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims.

Harry Kalven, Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

The class action device resolves this power imbalance by pooling the plaintiffs' claims so that the class as a whole may approximate the aggregated resources and incentives that the defendant possesses. This past Term, Justice Ginsburg reaffirmed this value of class action lawsuits, writing:

> When adjudication is costly and individual claims are no more than modest in size, class proceedings may be "the thing". . . . [D]isallowance of class proceedings severely shrinks

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[2] *Abron v. Black & Decker (U.S.), Inc.*, 654 F.2d 951, 973 (4th Cir. 1981) ("Without the backing of a comprehensive class, individual plaintiffs or their lawyers will find it difficult to muster the resources and incentives sufficient to tackle industrial giants . . . We will observe classic applications of the strategy of divide and conquer.").

> the dimensions of the case or controversy a claimant can mount. . . .

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758, 1783 (2010) (Ginsburg, J., dissenting).[3]

Aggregation not only levels the playing field, it also reduces plaintiffs' overall fees and costs and hence enhances aggregate recovery.[4]

3. *Class Actions Further Compensatory Goals By Notifying Individuals of Potential Legal Claims and Enabling Their Easy Participation, Thus Ensuring A Wider and Fairer Distribution of Resources.* Class actions promote fair compensation to harmed individuals by providing potential class members with notice of their legal rights and by presuming membership in the class absent an affirmative request to opt out. Fed. R. Civ. P. 23(c)(2). As this Court

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[3] In *Stolt-Nielsen*, this Court held that parties who agree to arbitrate disputes cannot be held to have agreed to class action arbitration, absent explicit consent. *Id.* The Court rested this decision on the important differences between individual arbitration and class action arbitration. In acknowledging these differences, the Court did not articulate any retreat from the prior holdings, discussed here, that acknowledge the various benefits of class actions.

[4] *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Studies 248, 264 (2010) ("By aggregating smaller claims into a single larger action, economies of scale in legal services are achieved, which can be passed onto class members in the form of enhanced recoveries.").

recognized in *Shutts*, ignorance is a significant obstacle in the context of small claims litigation:

> The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.

Shutts, 472 U.S. at 873.

The class action solves this problem by enabling one or a few class members who are aware of their rights to step forward and represent the class as a whole – while simultaneously ensuring that the class receive notice and be given the opportunity to participate in, or opt out of, those efforts. *See* Fed. R. Civ. P. 23(c); (e). It is this notice and opportunity to claim from a class action settlement or judgment that makes relief a reality for most class members in small claims situations. Absent a class action, few class members have either the knowledge or incentive to arbitrate or litigate individually, as this Court recognized in *Shutts*.

Because class actions enable wide participation of class members in aggregate settlements or judgments, compensation is spread more broadly throughout a class of similarly-situated consumers. With individual arbitration alone, a few may benefit but most will not; with class actions, a far wider group will benefit, ensuring a fairer distribution of compensation.

* * *

A system like AT&T's that prohibits aggregated processing sacrifices each of the compensatory functions of the class action: it provides relief to far fewer claimants, in a proceeding between unequal parties, leaving most class members not only uncompensated, but unaware that they even have legal claims.

B. Class Actions Deter Wrongdoing

This Court has long recognized that, in addition to their compensatory function, class actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies. As just discussed, where harms are small and dispersed, defendants can avoid liability because no individual has sufficient incentive to sue. By avoiding liability, defendants place the social costs of their actions on others. In enabling small-claim suits, class actions expose defendants to the risk of liability and thereby deter them from engaging in wrongdoing in the first place. Class actions thereby provide an important private supplement to public enforcement of social norms.

This point is illustrated in three steps: public enforcers are unable alone to deter all wrong-doing; private litigation generally, and class actions specifically, assist in this effort; private enforcement is not only an important complement to public enforcement, but often a superior deterrent mechanism.

1. *Class Actions Deter Because Public Agencies Are Unable To Enforce The Law Alone.* The Court has

recognized that public agencies cannot themselves detect and deter all wrong-doing. Private suits are an important complement to public enforcement. Forty-two years ago, the Court stated that:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.

Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-03 (1968) (per curiam).

The class action lawsuit is an important component of this private enforcement. This Court has stated that the very genesis of the class action device was to help fill the public enforcement void:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.

Roper, 445 U.S. at 339.[5]

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[5] *See generally*, Kalven & Rosenfield, *supra*, 8 U. CHI. L. REV. at 720 ("[T]o impose upon public agencies the task of asserting civil sanctions on behalf of injured groups will require a substantial increase in size, personnel and expenditures.").

2. *Class Actions Deter By Using Damage and Fee Provisions To Enlist The Private Bar In Law Enforcement.* The common fund fee award, regularly recognized by this Court for well over a century,[6] is a mechanism for compensating attorneys whose work creates a fund for a class of claimants. It thereby provides the incentive that enables private attorneys to pursue small claims cases for groups of individuals. This Court has regularly acknowledged the important role that these "private attorneys general" perform in supplementing governmental law enforcement.[7]

In cases outside the common fund context, this Court has observed that Congress often enacts particular litigation rules – such as damage and fee provisions – to enable private enforcement actions that supplement governmental deterrence efforts. Writing of treble damage awards in antitrust cases, this Court stated:

> Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to

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[6] *See Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trs. of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882).

[7] *See, e.g., Mills*, 396 U.S. at 396-97

> the Department of Justice for enforcing the antitrust laws and deterring violations.

Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (emphasis added). *See also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975); *Newman*, 390 U.S. at 402; *Roper*, 445 U.S. at 338.

This Court recently recognized the deterrent function of class actions in discussing punitive damage awards. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). The Court stated that the award of punitive damages promotes deterrence by incentivizing litigation. *See id.* at 2621-22. Simultaneously, the Court acknowledged that class actions serve the same function – incentivizing litigation and achieving deterrence – such that the need for punitive damages may retreat where the class suit is available. *See id.* at 2633-34 & n.28.

3. *Class Actions Deter Because Private Enforcement May Be Superior To Public Enforcement.* In certain circumstances, private class actions may be better situated than public enforcement to deter wrongdoing.[8] Private enforcement may offer at least three advantages.

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[8] *See, e.g.*, Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137 (Summer 2001) (noting that damage class actions can "supplement regulatory enforcement by administrative agencies that

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First, private enforcement may be more efficient than public enforcement.[9] *Second*, private enforcers may be less conflicted than captured public agencies.[10] *Third*, private enforcers may be less politically constrained than public enforcers.[11] Even if private enforcement is not superior to public enforcement, its very availability is important as the "sheer diversity of enforcers should generate more innovations than a monopolistic government enforcer would produce." Thompson, *supra*, 2000 U. ILL. L. REV. at 206.

* * *

In sum, this Court has long acknowledged that private adjudication generally, and class actions in particular, supplement the government's ability to deter wrongdoing. A system like AT&T's that prohibits class-wide lawsuits and arbitrations, sacrifices the deterrent function of the class action: it enables only

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are under-funded, susceptible to capture by the subjects of their regulation, or politically constrained").

[9] *See* Mark A. Cohen & Paul H. Ruben, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 168-69 (1985).

[10] *See, e.g.*, Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 189-92 (2000) (identifying "scores of reports criticizing agencies for being too deferential in enforcing environmental laws").

[11] *See id.* at 191 ("[P]ublic under enforcement may be intrinsic to the political process by which laws are passed and implemented."); Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075, 1093 (1980) (arguing that public enforcement may not be optimal because the legislature, the bureaucracy, and personal goals of career advancement shape the prosecutor's case selection).

individual arbitrations that few consumers have an incentive to pursue, the collective effect of which therefore has little deterrent value.[12] Individual arbitration alone does next to nothing to supplement the government's enforcement of legal norms.[13]

C. Class Actions Promote Administrative Efficiency

This Court has long recognized that aggregate litigation promotes administrative efficiency.[14] Just this past Term, the Court stated that Rule 23 is "designed to further procedural fairness and efficiency." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010). Class actions promote administrative efficiency in at least three ways: by avoiding a multiplicity of actions, by enabling

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[12] *Abron*, 654 F.2d at 973 ("[T]he deterrent effect of across-the-board class actions challenging systemic discrimination cannot be matched by even a series of single-plaintiff actions or single-issue class actions.") (citation omitted).

[13] *See* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. Chi. L. Rev. 157, 177 (2006) ("No matter how cost effective arbitration might be, such small claims simply are not viable as a matter of individual arbitration and stand as effective buffers against any kind of accountability . . . .").

[14] *See, e.g., Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467 n.12 (1975) (acknowledging "the purposes of litigatory efficiency served by class actions"); *Am. Pipe Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (characterizing "efficiency and economy of litigation" as "a principal purpose of the [class action] procedure"); *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853).

claim processing through representatives, and by preventing inconsistent adjudications.

1. *Class Actions Further Efficiency Through Consolidation.* Rule 23 prevents multiplicity of actions, and thus conserves both judicial and party resources, by enabling a single litigation through representatives on common issues of law and fact where joinder would be impracticable. As this Court has stated, "A federal class action is . . . a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe*, 414 U.S. at 550. By resolving common legal and factual issues in a single adjudication, class actions utilize judicial resources more efficiently than piecemeal individual litigation.[15] Put simply, it is less expensive and time consuming to process one class action than many individual actions.

Class actions are particularly efficient when many similarly-situated individuals have claims sufficiently large that they would each pursue their own individual cases. In these situations, the courts are flooded with repetitive claims involving common

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[15] *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.").

issues.[16] It is less obvious that class actions serve efficiency goals in the small claims context because there is not a flood of litigation but a drought. Yet, as noted in the previous section, this drought is often the by-product of an inefficient under-enforcement of legal norms. By enabling litigation where there would otherwise be none, class actions create more work for the court system, but thereby generate important spillover effects – what economists call "positive externalities" – that serve to make the enforcement of law more efficient.[17] For example, the small claims class action creates norms that govern and deter defendant behavior in future cases.[18]

Where claims are many, class actions save scarce judicial resources by processing them in groups; where claims are few, class actions save scarce public enforcement resources by enabling private enforcement through aggregate claiming.

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[16] *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999) ("One great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation."); *Amchem*, 521 U.S. at 615.

[17] *See* William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006).

[18] *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971) ("A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices. . . .").

2. *Class Actions Further Efficiency By Enabling Litigation Through Representatives at Reduced Cost to Claimants.* The aggregate processing of legal claims saves scarce judicial resources, but it also relieves individual members of the cost and work of litigating their claims individually. As this Court stated in *Shutts*, "[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Shutts*, 472 U.S. at 810.[19]

Because one or a few class representatives stand in for them, class members are spared the time and energy of pursuing their own individual arbitration or litigation. This is particularly efficient when claims are so small that each individual who pursues an individual arbitration invests more in that process than she will get out of it. Empirical evidence demonstrates that aggregation reduces fees and costs.[20]

3. *Class Actions Further Efficiency Through Adjudicatory Consistency.* The class action device also advances administrative efficiency by reducing the risk of inconsistent adjudications. Typically, inconsistent outcomes are viewed as a threat to judicial

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[19] *See also id.* at 809 ("Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests.") (citation omitted).

[20] *See* Eisenberg and Miller, *supra* note 4, *passim*.

legitimacy, not a problem of adjudicatory efficiency.[21] But inconsistent results also provide confusing, inefficient signals to both plaintiffs contemplating future litigation and defendants attempting to comply with the law.

The class action solves this problem in two ways. *First*, in cases litigated under Rule 23(b)(3), notice informs everyone in the class of proposed relief and helps make that relief equally available to everyone in the group, providing consistency across the group and *vis a vis* the defendant. *Second*, in special situations where inconsistent outcomes are particularly problematic, Rule 23 enables mandatory classes to be certified precisely to ensure against this problem. *See, e.g.*, Fed. R. Civ. P. 23(b)(1)(A).

* * *

A system that prohibits aggregate litigation, such as AT&T's, sacrifices the efficiencies of aggregate litigation: it requires many proceedings where one might suffice; it requires each individual to proceed herself, though few have the knowledge, capacity, or incentive to do so; and it increases the risk of inconsistent outcomes.

In sum, although this Court's jurisprudence has long identified, and often reiterated, the critical

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[21] *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 29, cmt. F (1982) (noting, in discussing the purposes of issue preclusion, that producing consistent outcomes promotes confidence in the accuracy of judicial determinations).

compensatory, deterrent, and efficiency functions of the class action, Petitioner and its *amici* barely acknowledge any of these virtues. And for good reason: the prohibition on class actions that they defend would sacrifice all of these benefits were it upheld.[22]

II. THE CENTER FOR CLASS ACTION FAIRNESS'S ARGUMENT THAT CLASS ACTIONS ARE NOT AN ESSENTIAL MEANS OF COMPENSATION IS UNCONVINCING

The Center for Class Action Fairness [the "Center"] argues that "in many cases class actions prove particularly inadequate to the task of affording consumers access to meaningful relief," Center Br. at 22, and that individual arbitration is more effective than class actions at providing consumers with such relief. *Id.* at 23. The Center criticizes class actions for taking longer, being more cumbersome, and providing less relief than individual arbitration, concluding its parade of horribles by asserting that "the Ninth

[22] The Circuit Courts have regularly acknowledged this point. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006) (stating that if a class action ban were enforced, the defendant would be "essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law;" noting that "[p]laintiffs will be unable to vindicate their statutory rights;" and that "the social goals of . . . antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield"); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223-24 (11th Cir. 2007) (accord).

Circuit's belief that consumers will not file claims in individual arbitrations is incorrect." *Id.* at 26.

The logic of the Center's brief fails on each of these points, but most importantly, the Center's brief fails to inform this Court of one critical fact – although AT&T had nearly 70 million customers by the end of 2007, in the five years between January 1, 2003 and December 31, 2007 only 170 customers in the United States filed arbitrations against AT&T Mobility, AT&T Wireless, or Cingular Wireless.[23] Between October 30, 2006 and December 31, 2007 – the period after AT&T implemented the arbitration clause at issue here with the $7500 provision alleged to enable consumers to seek individual relief – only 10 customers filed for arbitration.[24] This evidence demonstrates that few individuals file individual arbitrations. It also shows that the $7500 clause had no demonstrable effect on individual filing except, perhaps, to decrease that filing. By contrast, the Center offers not a single piece of empirical evidence showing that consumers do file individual arbitration

[23] *See* Decl. of Bruce L. Simon in Support of Plaintiffs' Opposition to Defendants' Amended Motion to Compel Arbitration, *Coneff v. AT&T Corp. et al.*, No. 06-944 (W.D. Wash., filed Mar. 14, 2008) (reporting on data collected from American Arbitration Association website statistics); *Coneff v. AT&T Corp. et al.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (citing these figures as evidence that the arbitration provisions at issue here "are not having their intended effect").

[24] *Id.* at 2-3.

claims with any regularity – even when given the benefit of the $7500 clause.

A. Class Actions Are More Expeditious Than Individual Arbitrations

The Center's initial point is that class actions may take two to three years to resolve. *See* Center Br. at 6-7. By contrast, it argues, "the average time from filing to final award for the consumer arbitrations studied was 6.9 months." *Id.* at 23. From these two data points, the Center concludes that arbitration is more efficient at resolving consumer claims than class actions are.

The Center's logic fails to account for one critical fact: the two-three year class action typically resolves thousands, possibly tens of thousands, of claims, while the seven-month arbitration resolves but one. Were arbitration to resolve even 1,000 claims, this would take 7,000 months, or close to 600 years – all to do what one (relatively small) class action lawsuit does in two to three years. Of course, 1,000 individual arbitrations would not necessarily proceed sequentially, so perhaps 600 years is an exaggeration; but it is equally obvious that 1,000 arbitrations would not proceed simultaneously and, at seven months per arbitration, would not likely be resolved within the

two to three year period that it typically takes to resolve a class action.[25]

The Center's brief might be focused solely on one individual who files arbitration, noting that for this individual seven months is shorter than two to three years. However, this focus belies the fact that a negligible portion of the affected class ever files for arbitration, so few individuals enjoy the benefit of the seven month time frame. Indeed, absent a class action, most class members will be aware of neither their arbitration rights nor of an alleged harm. *See* Part I(A), *supra*. Expeditious processing is of no value to individuals who are ignorant of, or as a practical matter are unable to exercise, their rights. Once individuals learn of their rights, they will likely file claims in larger numbers, *see* Part II(B), *infra,* and the larger number of claimants will necessarily extend the seven month time frame for each individual arbitration.

In short, the Center's comparison of the time it takes to process a class action for many consumers to the time it takes to process one individual arbitration

[25] The American Arbitration Association reports that it conducts a total of about 15,000 consumer arbitrations per year (data *available at* http://www.adr.org/si.asp?id=5027). If all consumer class action claim forms were transformed into individual arbitration cases, this 15,000 claims/year system would be flooded and the seven-month processing period would necessarily change dramatically. Moreover, this would significantly increase the number of arbitrators and lawyers involved in processing claims.

is specious. The proper comparison is between the time it takes to process all claims in a class suit and the total time it would take to arbitrate that number of claims individually. There can be little doubt that the aggregate processing time of the class action is significantly less than the sum of the time it would take to arbitrate individually each class member's claim.

B. Class Action Claiming Is Less Onerous Than Individual Arbitration

The Center's second argument is that even in settled class cases, claiming is cumbersome and ineffective for two reasons – because the class must be noticed of the settlement and because the claim form may be complex. *See* Center Br. at 8-11. The Center suggests that claiming is modest in class suits because of these problems. *Id.* at 10-11. Both of these problems (notice and claiming) infect individual arbitrations to an even greater extent and hence claiming rates under individual arbitration clauses are much lower than they are in class action lawsuits.

1. *Notice is Better in Class Suits Than In Individual Arbitrations.* For individual consumers to know they have a right to arbitrate, they must locate the contract with their consumer company. This alone often proves impossible. Assuming consumers do find the contract, they must then read through it to determine their rights. The average consumer will not

know what an arbitration clause is, much less, having found it in a contract, how to proceed under it.

The arbitration clause before the Court (Appendix C to the Petition for a Writ of Certiorari) is exemplary. The clause is seven pages long and consists of a number of tightly spaced paragraphs, one of which lasts for more than a page. The language is complex and full of legalese. AT&T's chosen method of maximum emphasis – writing text in all capitals and in bold font – is used only to emphasize the clause that bars class arbitration. The agreement gives instructions on how to send a "Notice of Dispute." Unless the complaint is resolved, the consumer may, thirty days later, "commence an arbitration proceeding." But the agreement itself does not explain how a person is to commence such a proceeding.[26] Empirical studies of arbitration agreements shows that this agreement is not atypical.[27]

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[26] *See also* Judith Resnik, *Whether and Whether Adjudication?*, 86 B.U. L. Rev. 1101, 1135-36 (2006) (reproducing the author's Cellular Service Agreement, which included an arbitration clause that failed to explain important aspects of the arbitration process).

[27] *See, e.g.*, Linda Demaine and Deborah Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law & Contemp. Probs 55, 67-70 (Winter 2004) (finding that 31% of arbitration contracts did not explain who would administer the arbitration, 73% said nothing about how arbitrators would be selected, two-thirds said nothing about discovery, and 42% provided no information about costs and fees).

This arbitration "notice" is far less availing than notices in class suits. Indeed, in a class suit, the notice advises the consumer that she has a claim and need only file a form; notice in the individual arbitration context merely advises the consumer she has a process available to her – if the consumer can even find that small print in her contract. Class action notices have as their purpose informing a lay-person of his or her rights, *see* Part II(B)(2), *infra*; the agreement before the Court, in contrast, seems designed primarily to defeat lawsuits.

2. *The Claims Process Is Simpler In Class Actions Than In Individual Arbitrations*. The claiming process in a class action suit is far simpler for consumers to navigate than is undertaking an individual arbitration from start to finish. As just noted, a non-lawyer will be hard pressed to even identify the right to arbitrate, much less how to initiate an individual arbitration. It may be that it is easier for a non-lawyer to undertake an individual arbitration without a lawyer than it would be for the non-lawyer to undertake a court case without a lawyer. But the relevant comparison is between a non-lawyer filling out a class action claim form and a non-lawyer undertaking an individual arbitration from start to finish. Class action claim forms, though occasionally dense, are often quite straightforward. Rule 23(c)(2) requires that notice in 23(b)(3) class actions be stated "clearly and concisely" in "plain, easily understood language."

Fed. R. Civ. P. 23(c)(2). The Federal Judicial Center provides litigants simple examples.[28] An entire industry exists for the purpose of making notice and claiming user-friendly. The same cannot be said for consumer contracts and their individual arbitration clauses. *See supra* note 27.

3. *Claiming Rates Are Higher In Class Actions Than In Individual Arbitrations.* The Center diverts attention from low claiming rates in arbitration systems by attacking claiming in class actions, stating that class action attorneys have an incentive to create "claims processes that make it prohibitively difficult for class members to make successful claims," Center Br. at 9, and that "[t]he award to the class and the agreement on attorney fees represent a package deal." *Id.* at 10. These statements are either simply wrong or grossly exaggerated.

There is no empirical evidence that improper fee practices are widespread.[29] Courts have adequate

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[28] *See* FED. JUDICIAL CTR., *"Illustrative" Forms of Class Action Notice, available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376.

[29] *See, e.g.*, 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1803.1 n.5 (3d ed. 2005 & Update 2010); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUDIES ___ (forthcoming, 2010) (reporting that in all federal class action settlements in 2006, attorneys received only 13% of the settlement amount, and in 2007 only 20%, and noting that "these percentages are far lower than the portions of

(Continued on following page)

means of preventing conflicts of interest from tainting the class settlement. Courts strongly discourage litigants from simultaneously negotiating attorney's fees and the class's claims.[30] Moreover, processes that frustrate claiming are less likely to be approved by courts.[31] Courts often set attorney's fees only after learning what claims rates are.[32] And unclaimed monies in class settlements rarely revert to the defendant, so class action attorneys are not making deals for high fees in exchange for reversionary funds.[33] There is so little to support this picture of class action practice today that the Center's brief cites only a passage in a 23-year-old law review article (taken out of context) and a half-sentence from one 14-year old case. Center Br. at 9-10 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 883-84

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settlements that contingency fee lawyers receive in individual litigation, which are usually at least 33%.")

[30] *See* Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.7 (2004).

[31] *See id.* at § 21.62.

[32] *See id.* at § 21.71 ("It is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution is complete.")

[33] *See* 3 William B. Rubenstein et al., Newberg on Class Actions § 10.17 (4th ed. 2002 & Update 2010) ("Generally, reversion of such funds . . . has been rejected by courts because reversion would defeat the important deterrence objectives of the underlying statute. . . .")

(1987) and *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996)).

Most damning to the Center's picture of class action practice is the fact that the extent of claiming without class actions will be far less than it is with class actions. There are, unfortunately, no sound empirical studies of class action claims rates, in part because such data are rarely reported to courts at the conclusion of the claiming process.[34] Without data, the Center simply finds two low claiming cases to represent the whole – one in which 2,676 out of 10 million class members made claims and one in which 165 class members in 291,000 made claims. Center Br. at 11.[35]

What the Center fails to report is that under individual arbitration clauses, such as this one, consumers find even less relief than in these "bad"

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[34] *See* Nicholas M. Pace and William B. Rubenstein, *How Transparent Are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data*, in CAN INCREASED TRANSPARENCY IMPROVE THE CIVIL JUSTICE SYSTEM? (tentative title) (forthcoming, 2011).

[35] The data that are available on class action claiming show rates far exceeding the Center's two selective examples. *See, e.g.*, Pace and Rubenstein, *supra*, at 32 (reporting that in nine cases with claiming information available, three had distribution rates below 5%, two of which were below 1%; four cases had distributions rates between 20-40% of the class; and two cases had distributions rates above 50%, one at 65% and one at 82%).

class actions. As noted above,[36] fewer than 200 consumer arbitrations involving AT&T and Cingular were conducted in a five-year time span, while at the end of that same time span AT&T had over 70 million customers. The claims rates in the worst class action lawsuit the Center could find to cite is .027% (2,676 claims in a class of 10 million). Yet only .00029% (200 individual arbitrations from a base of 70 million customers) of AT&T's customers ever initiated individual arbitration, for any reason whatsoever, over a five year period.

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The Center aims to demonstrate that individual arbitration is a superior compensatory mechanism to the class action but its brief fails to accomplish that task. There can be little doubt that if defendants are able to use adhesion contracts to opt out of class actions, compensatory goals will be seriously frustrated.

III. THE CHAMBER OF COMMERCE'S ARGUMENT THAT CLASS ACTIONS DO NOT DETER MISCONDUCT IS UNCONVINCING

The Chamber of Commerce [the "Chamber"] argues that class arbitrations do not meaningfully deter unlawful conduct for three reasons: (1) the

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[36] *See supra* text accompany notes 23-24.

availability of public law enforcement reduces the need for class arbitration as an additional deterrent device; (2) the potential for overwhelming liability in the form of a class judgment forces defendants to settle regardless of whether they act unlawfully, meaning that class actions are arbitrary and create no deterrent effect; and (3) that requiring class arbitration will cause defendants to abandon arbitration altogether and individual consumers will be forced to forgo their claims completely, leaving many meritorious claims unprosecuted. This section responds to each of these contentions, demonstrating that foreclosing class actions would undermine the deterrent effect of the law.

A. Class Actions Provide A Necessary Supplement To Public Law Enforcement

The Chamber states that compensation is the primary purpose of the class suit and deterrence a secondary one. Chamber Br. at 5-6. It therefore concedes that the class action aims to deter, but it argues that the availability of public law enforcement mechanisms obviates the need for this private deterrence. *Id.* at 6-7.

First, the Chamber's claim that compensation is the primary function of the class action is not universally accepted. Many prominent commentators have argued that efficient deterrence is either a, or the, primary function of modern class actions:

> If each is left to assert his rights alone if and when he can, there will be at best a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to undermine the deterrent effect of the sanctions which undermine much contemporary law.

Kalven & Rosenfeld, *supra*, 8 U. CHI. L. REV. at 686; *see also* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534 (2006).

Second, and more importantly, the Chamber's argument that the availability of public law enforcement obviates the need for private law enforcement is at odds with most every authority on this topic: this Court's well-established precedents, Congress's stated preferences, and the scholarly consensus. This evidence is set forth in detail above, *see* Part I(B), *supra*, and need not be repeated here.

While that evidence severely undermines the Chamber's argument that public enforcement is sufficient, what fully forecloses the Chamber's position is the fact that public enforcers themselves do not share in the belief that public enforcement alone is a sufficient deterrent mechanism. Agency leaders have explicitly acknowledged their reliance on private enforcement as a supplement to their own deterrent capacities.

For example, in 1995, the former Chair of the Securities and Exchange Commission ("SEC"), Arthur Levitt, testified to the House subcommittee considering class action reform that, "Private actions . . . provide a necessary supplement to the commission's own enforcement activities by serving to deter securities law violations."[37] The SEC's reliance on private enforcement is so significant that its own website advises concerned investors to "find out whether a private class action has been filed against the company you invested in. . . ."[38] The SEC is not alone. The former Chair of the Federal Trade Commission, Thomas B. Leary, stated that, "The Federal Trade Commission is a relatively small agency with broad competition and consumer protection responsibilities. . . . We depend on private litigation to supplement our efforts."[39]

Despite entitling its argument, "There Are More Important Deterrents To Unlawful Conduct Than Class Actions," Chamber Br. at 5, the Chamber's brief offers no evidence in support of the proposition that public enforcement is a "more important deterrent"

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[37] *Common Sense Legal Reform Act: Hearing before the Subcomm. on Telecomm. and Fin., H. Comm. on Commerce*, 104th Cong. (1995) (statement of Arthur Levitt, Chairman of the U.S. Sec. & Exch. Comm.)

[38] Sec. & Exch. Comm'n, Investor Claims Funds, http://www.sec.gov/divisions/enforce/claims.htm (last visited Sept. 13, 2010).

[39] Press Release, Fed. Trade Comm'n, FTC's Thomas B. Leary Address Summit (June 26, 2003), *available at* www.ftc.gov/fopa/2003/06/learyspeech.htm

than private conduct, nor does the brief, in any way, engage with this Court's, Congress's, scholars', and agency chiefs' insistence that private litigation generally, and class actions specifically, are critical complements to public law enforcement.

B. The Chamber Fails To Demonstrate That Class Actions Do Not Deter Misconduct

The Chamber's second argument, entitled "Class Arbitration Does Not Deter Misconduct," Chamber Br. at 7, actually argues that class actions, not class action arbitrations, fail to deter misconduct. *Id.* at 7-12. Although the argument is a mish mash, its essence boils down to three assertions: (1) the effect of class certification is so great that it compels defendants to settle, *id.* at 7; (2) defendants settle regardless of their liability, *id.* at 10-11; and (3) if defendants settle regardless of their liability, no deterrent effect is created, *id.* at 10. Not one of these three assertions is proved.

1. *Defendants Do Not Invariably Settle Class Actions.* The Chamber asserts that once a class is certified, the potential liability is so great that "[d]efendants will inevitably settle in those circumstances." *Id.* at 7. Assuming, *arguendo*, the truth of this proposition, it pertains to but a small portion of filed class actions – those actually certified. As the Chamber's brief itself recognizes 10 pages later, "only

20% of putative classes are certified." *Id.* at 17 (citing empirical studies).

The Federal Judicial Center's empirical evidence shows that roughly two out of three class actions have a ruling on a motion to dismiss, a motion for summary judgment, or a *sua sponte* dismissal order and that "approximately three out of ten cases . . . [are] terminated as the direct result of a ruling on a motion to dismiss or a motion for summary judgment."[40] Indeed, the FJC study suggests that there is little empirical evidence supporting the proposition that certified class actions are any less likely to go to trial than are individual actions. *Id.*

Thus, the Chamber's first premise – that class suits invariably settle – ignores available empirical evidence on class action dispositions; even if the Chamber's point is that all *certified* cases settle, that captures only a small portion of all class actions. Therefore, the Chamber's logic – because all class actions settle none deter – is undermined at its very first step.

2. *There Is Little – or No – Proof That Class Action Settlements Are Unrelated to A Case's Merits.* The Chamber's second point is that not only do class suits settle, but they do so regardless of the merits.

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[40] Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 8 (Federal Judicial Center, 1996).

The Chamber seeks to support this proposition on two bases – with a logic experiment and by reference to a few highly criticized law review articles. The logic experiment is found on page 8 of the Chamber's brief:

> Defendants have a financial incentive to settle class actions even when the plaintiff's claim has little or no merit. Basic mathematics and risk aversion make it so: Attorneys' fees aside, a risk-averse defendant that thinks it has a 90 percent chance of defeating a $100 million class action is still better off settling for $9.9 million. The result is an *in terrorem* effect that compels defendants to settle claims ***that have no merit***.

Chamber Br. at 8 (emphasis added).

There are two problems with the Chamber's logic. In the example provided, plaintiffs' case had a 10% chance of securing $100 million and hence was worth $10 million. If a defendant can settle that case for $9.9 million, it is coming out ahead. It is not, as the Chamber ends up arguing, settling "claims that have no merit." *Id.* It is settling a claim worth $10 million for less than $10 million. Indeed, in the Chamber's own example, the settlement is in line – almost perfectly – with the expected merits of the case. The Chamber's *in terrorem* argument that class actions settle regardless of their merits is also undermined by the empirical evidence presented above showing that not all class suits, even those certified, settle. *See generally*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003)).

Beyond the failed logic experiment, the Chamber offers evidence from scholarly studies purporting to show that class action settle without regard to their merits. Chamber Br. at 10-11 (citing law review articles). What the Chamber fails to inform the Court is that these studies are few, dated, highly contested, and solely about securities class actions. For example, the most famous of these studies, Professor Alexander's 19-year old article,[41] has been severely criticized for relying on a mere six class actions and for ignoring key variables.[42] Moreover, the few studies the Chamber cites all concern only securities class actions, though all commentators, including Professor Alexander, conclude that securities class actions cannot be conflated with consumer class actions.[43]

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[41] Janet Cooper Alexander, *Do The Merits Matter? A Study of Settlements of Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

[42] *See, e.g.*, James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 503 (1997) (questioning whether "it is appropriate . . . to draw such a sweeping conclusion from a sample [so] slender"); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2083-84 (1995) (showing that, after removing industry-wide effects on the six defendants, the settlements ranged from 23.11% to 79.77% of allowable recovery, a far greater range than calculated by Professor Alexander); *see generally* Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 448 (1994) (demonstrating the flaws in several similar studies).

[43] *See* Alexander, *supra* note 41, at 526-28.

In sum, the Center has little proof for the proposition that class actions settle regardless of their merits – and no proof whatsoever from the consumer context.

3. *Class Actions Deter*. The Chamber's argument is that (1) class actions settle (2) regardless of their merits and (3) hence create no deterrent effect. Because the first two premises have been disproved, the third is irrelevant. But it, too, is faulty, inaccurately reporting and incorrectly applying one passage in a theoretical treatise. Chamber Br. at 10 (citing A. MITCHELL POLINSKY & STEVEN SHAVELL, *The Theory Of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 404, 427 (2007)).

Professors Polinsky and Shavell do argue, writing about the criminal context, that both "mistaken convictions" and "mistaken acquittals" reduce deterrence. The Chamber's first problem is equating their image of the class action settlement to a "mistaken conviction." Class action settlements are unlikely to be "mistaken convictions" for the reasons discussed above – empirical evidence demonstrates that the courts sort out many class suits on their merits; the scant evidence to the contrary is solely from the securities field and roundly criticized; and the settlement of a case having a 10% probability of success for 10% of its maximum value is not a "mistaken conviction." As importantly, and more disingenuously, the Chamber conveniently ignores the "mistaken acquittal" side of Professors Polinksy's and Shavell's argument. Unpunished culpable conduct also reduces

deterrence because it encourages parties to engage in socially-undesirable conduct. Eliminating the class action device would vastly increase the risk of such "mistaken acquittals."

That the Chamber's brief misreports the scholarship on which it relies is immaterial, in any event, because without evidence that class action settlements are unrelated to their merits, the "therefore no deterrence" argument is unavailing in any event.

C. The Chamber Fails To Demonstrate That Abandonment Of Arbitration Will Either Occur Or Decrease Deterrence If It Does Occur

The Chamber's third argument is that if corporations cannot ban class action arbitrations, they will abandon arbitration and that this abandonment will harm deterrence efforts. Chamber Br. at 11-20. In support of the abandonment claim, the Chamber offers but one actual example (Comcast). In support of the conclusion that the abandonment of arbitration will harm deterrence efforts, the Chamber offers even less support. As demonstrated above, *see* Part II(B), *supra*, the claiming rates in class actions are generally much higher than the insignificant rate of individual consumer arbitrations. Given that individual arbitration does so little for so few, it is difficult to take seriously the Chamber's argument that corporate abandonment of individual arbitration would result in a significant decrease in deterrence.

In fact, the Chamber's real point here appears to be that class action bans are wise policy because both class action arbitration and class action litigation are rife with inherent and unsolvable problems. Class action arbitration, the Chamber argues, is bad for businesses, Chamber Br. at 12-16, while class action litigation, the Chamber argues, switching focus, is bad for consumers. Chamber Br. at 16-19. Although the specifics of class action arbitration practice are in a state of development in this country, the same cannot be said about class action litigation: it is a well-established part of the American litigation landscape. As set forth in Part I of this Brief, this Court has regularly identified a variety of functions that class action litigation serves. The Chamber's brief acknowledges none of this case law and ignores all of its lessons. No one thinks that the class action is perfect, but most commentators, following this Court's lead, regularly acknowledge its virtues.[*]

* * *

[*] To the extent that there are problems with the class action device, the appropriate response is for Congress to reexamine Rule 23, as it has done many times in the past decades, not to permit defendants to unilaterally write it out of existence. *See Roper*, 445 U.S. at 339 ("That there is a potential for misuse of the class action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.").

The Chamber aims to show that arbitration is a superior deterrent mechanism to the class action but its brief fails to accomplish that task. There can be little doubt that if defendants are able to use adhesion contracts to opt out of class actions, deterrent goals will be seriously frustrated.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision below.

Respectfully submitted,

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APPENDIX
Selected Bibliography of *Amici*'s Scholarship

This is a selected list of *amici*'s scholarship about class action litigation.

1. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. 1553 (2008)

2. Kevin M. Clermont et al., Materials for a Basic Course in Civil Procedure (9th ed. 2007)

3. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 Cornell L. Rev. 119 (2002)

4. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288 (2010)

5. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 Cardozo L. Rev. 407 (2008)

6. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006)

7. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000)

8. John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* AmChem Products – *Or, Why Attorneys Still Need Consent To Give Away Their Clients' Money*, 84 Va. L. Rev. 1541 (1998)

9. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995)

10. John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995)

11. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987)

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AMICUS CURIAE BRIEF

No. 09-893

In The
Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* MARYGRACE CONEFF, ET AL. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Marygrace Coneff, a 57-year-old social worker residing in California, represents a putative class of consumers nationwide who were customers of AT&T Wireless Services, Inc. ("AWS") when that company merged with Cingular Wireless ("Cingular") in 2004.[2] Ms. Coneff contends that, following the merger, the merged company – now known as AT&T Mobility ("AT&T") – purposefully dismantled the AWS network, forcing AWS customers to accept degraded service and pay additional fees, transfer to Cingular and pay additional fees, or cancel their service altogether and incur termination fees. The plaintiffs allege violations of Washington's Consumer Protection Act.

After AT&T moved to compel individual arbitration, the parties engaged in extensive discovery and factual development concerning the ban on class actions in AT&T's consumer contract – the same class

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation or submission.

[2] The other named plaintiffs in the *Coneff* case on behalf of whom this *amicus* brief is filed are Alex Aschero, Christine Aschero, Joanne Aschero, Jennie Bragg, Amy Frerker, Devin Gilker, Jeff Haymes, Michelle Johns, Steven Knott, Liesa Krausse, Harold Melendez, Leonard Shulman, and Steve Shulman.

action ban at issue here. The plaintiffs uncovered evidence showing that, while thousands of customers complained to a consumer advocacy group about their service after the merger, only a few hundred of AT&T's 70 million customers pursued claims against the company in arbitration or small claims court. In addition, several practitioners who specialize in representing individual consumers against corporations testified that AT&T customers such as Ms. Coneff would not be able to retain qualified attorneys on an individual basis. Meanwhile, AT&T failed to produce any evidence that it had ever paid out any of the so-called "premiums" that supposedly make its arbitration clause "consumer friendly" (*see* AT&T Br. 6-7), and counsel for AT&T conceded in open court that the company in fact does not pay those premiums.

On May 22, 2009, based on the extensive factual record, the U.S. District Court for the Western District of Washington found that AT&T's class action ban would exculpate the company from liability for widespread violations of law. *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009). AT&T appealed, and the U.S. Court of Appeals for the Ninth Circuit stayed the appeal pending this Court's decision in *Concepcion*.

As AT&T customers who have successfully proven that AT&T's class action ban would as a factual matter exculpate AT&T from liability, the *Coneff* plaintiffs have a unique perspective on the issues in this case. The evidence in *Coneff* directly refutes

AT&T's unsupported claim that its arbitration clause provides customers with an effective means of redress.

STATEMENT

This case is not really about arbitration – it is about whether corporations can use bans on class actions to evade liability under state consumer protection laws. AT&T is not worried about the exposure created by individual actions, whether in arbitration or in court; few customers have ever brought individual claims against AT&T, and the total economic impact of those disputes on the company is "infinitesimal." *Coneff*, 620 F. Supp. 2d at 1258. What AT&T *does* care about is making sure that its customers can never join together in a class action, even if they allege system-wide wrongful practices but have individually small disputes.

To that end, AT&T and its corporate affiliates have repeatedly altered their arbitration clauses over time with one goal in mind: to preserve the class action ban. Again and again, courts have struck the ban down as an unlawful attempt to exculpate the company from liability. *E.g.*, *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592 (D.N.J. 2009); *Coneff*, 620 F. Supp. 2d 1248; *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250 (Ill. 2006); *McKee*

v. AT&T Corp., 191 P.3d 845 (Wash. 2008); *Scott v. Cingular Wireless LLC*, 161 P.3d 1000 (Wash. 2007). Each time a court invalidated its class action ban, the company used the unilateral change-in-terms provisions in its contract to "promulgate" a new version of the arbitration clause. For example, in *McKee*, by the time the enforceability of AT&T's class action ban reached the Washington Supreme Court, at least five different versions of the arbitration clause were in the record. 191 P.3d at 850. Indeed, "AT&T had revised the contract so often – twice alone in the month McKee had opened his account – that even its own lawyers did not know which terms applied." David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. Rev. 605, 606 (2010).

Significantly, in each new version of its arbitration clause, AT&T left the class action ban untouched – even though that was the term struck down as exculpatory. Instead, AT&T tinkered with *other* terms in the clause, removing terms like high fees and bans on punitive damages and replacing them with "premiums" promising rewards for any consumer able to prevail in individual arbitration. *See Amicus* Br. of AT&T Mobility in Supp. of Neither Party, at 10-11, *T-Mobile v. Laster*, No. 07-976, 128 S. Ct. 2500 (May 27, 2008). AT&T apparently hoped that each modification would distract courts from the problematic class action ban and thus achieve its goal of immunizing itself from any risk of class-wide liability.

SUMMARY OF ARGUMENT

AT&T and its *amici* make broad generalizations about the advantages of AT&T's arbitration clause, proclaiming it "a realistic and effective dispute-resolution mechanism for consumers." AT&T Br. 5. The facts, however, show otherwise.

Put to the test, AT&T's vague assertions have been debunked by hard evidence. In *Coneff*, the district court analyzed testimony from over 20 witnesses, statistics about customers' response to its arbitration clause, and extensive discovery about the clause's development. The admissible evidence was discussed and debated at oral argument. The court then concluded that the evidence overwhelmingly demonstrated, as a factual matter, that AT&T's class action ban is exculpatory: it ensures that, even if the company cheats large numbers of customers in the same way, the vast majority of them will *never* hold AT&T liable no matter how valid their claims are.

AT&T does not deny this. Instead, AT&T asks this Court to hold that so long as its class action ban "does not immunize [AT&T] from *all* liability" under state law, the class action ban must be enforced. AT&T Br. 47 (emphasis added). Under AT&T's theory, as long as just *one* individual can get her money back in individual arbitration, the Court should not concern itself with the millions of other American consumers whom AT&T has allegedly cheated in the same way as the Concepcions and Ms. Coneff. *See* AT&T Br. 36.

AT&T's pitch to this Court is simple: it seeks a new rule of federal law that state consumer protection laws only apply to the tiny number of consumers who would pursue their claims individually, and leave the rest with nothing. But state consumer protection laws are intended not merely to compensate the handful of customers with the tenacity and resources to mount an individual legal challenge; they are aimed at stopping and deterring widespread illegal behavior. AT&T's proposed rule would gut this long-standing purpose of state law and permit businesses to insulate themselves from liability. It should be rejected.

ARGUMENT

I. AT&T'S CLASS ACTION BAN HAS BEEN PROVEN TO IMMUNIZE THE COMPANY FROM LIABILITY FOR WIDESPREAD VIOLATIONS OF STATE LAW.

AT&T and its *amici* argue repeatedly that its class action ban is not exculpatory. Indeed, AT&T boasts that one judge stated that its arbitration clause contains "perhaps the most fair and consumer-friendly provisions this Court has ever seen." AT&T Br. 1 (citing *Makarowski v. AT&T Mobility*, No. 2:09-cv-1590-GAF-CW, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009)). That much-heralded remark appears in a two-page minute order entered against a *pro se* plaintiff who brought only an individual claim, made

no legal arguments against AT&T's class action ban, and required the assistance of an interpreter. *Id.*[3]

In contrast, in *Coneff*, the question of whether AT&T's class action ban was exculpatory was the subject of a pitched evidentiary battle. Nine expert witnesses who had spent years representing individual consumers against corporations, along with several other experts and fact witnesses, submitted declarations on behalf of the plaintiffs. AT&T responded with its own declarations, and witnesses on both sides were deposed. The plaintiffs submitted information on individual arbitrations brought against AT&T. After considering all the evidence, the district court issued findings of fact that AT&T's class action ban would exculpate the company from liability for widespread violations of law. The rich factual record developed in *Coneff*, along with that of another putative class action against AT&T, *Cruz v. Cingular Wireless, LLC*, No. 2:07-cv-714-FtM-29DNF, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), provide key

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[3] *See also* Pl.'s Opp'n to Mot. to Compel Arbitration, *Makarowski*, 2009 WL 1765661 (June 17, 2009); Civil Minutes on Def.'s Mot. to Compel Arbitration and Dismiss Case, *Makarowski*, 2009 WL 1765661 (June 1, 2009) ("The Court ORDERS defense counsel to contact plaintiff, through an interpreter, and advise her that she has two (2) weeks, through and including June 15, 2009, to file an opposition to the Motion to Compel Arbitration.").

insights into the practical, real-world effects of AT&T's class action ban.[4]

A. The Factual Record in *Coneff* Proved That AT&T's Class Action Ban Would Function as an Exculpatory Clause.

AT&T claims that its clause provides "a realistic and effective dispute-resolution mechanism for consumers," AT&T Br. 5, and that, notwithstanding its ban on class actions, it "remains liable to all of its customers for all wrongdoing," AT&T Br. 44; *see also* DRI Br. 5 (touting the "significant benefits" of AT&T's arbitration clause). AT&T's *amici* also cite various "studies" for their argument that consumers file individual arbitrations. *See, e.g.*, Ctr. for Class Action Fairness Br. 25-26. But these generalities ring hollow in light of the extensive facts specific to AT&T's own clause and customers.

As explained below, the factual record in *Coneff* established that:

- The "premiums" in AT&T's arbitration clause are window dressing – they are

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[4] The *Cruz* plaintiffs allege that AT&T imposed a monthly charge for optional "Roadside Assistance" that they never requested, in violation of Florida's consumer protection law. *Cruz*, 2008 WL 4279690, at *1. The trial court granted AT&T's motion to compel individual arbitration, *id.* at *4, and the plaintiffs have appealed to the Eleventh Circuit.

never actually paid out to consumers or their attorneys.

- Fewer than 200 of AT&T's millions of customers brought claims in individual arbitration against the company for any reason, compared to thousands who sought help from a consumer group for the specific claims alleged in *Coneff*.

- Absent a class action, the vast majority of putative class members in *Coneff* would be unlikely to realize their legal rights had been violated.

- Assuming a member of the putative class in *Coneff* ascertained that her legal rights had been violated, she would almost certainly be unable to find a lawyer to bring an individual case against AT&T.

1. The data in *Coneff* confirmed that the vast majority of dissatisfied AT&T customers do not use the arbitration clause. *Coneff*, 620 F. Supp. 2d at 1258. By the end of 2007, AT&T had become the largest wireless provider in the nation, with over 70 million customers. *Id.* at 1252. But between January 1, 2003, and December 31, 2007, only *170 customers in the entire country* filed arbitration actions against AT&T.[5] And between October 30, 2006, and December

[5] Decl. of Bruce Simon in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 2-3, *Coneff*. References to evidence in *Coneff*, 620 F. Supp. 2d 1248, will simply cite "*Coneff*."

31, 2007 – after the implementation of the 2006 arbitration clause at issue here – only *ten* consumer arbitrations were filed against AT&T.[6] And only 256 claims were filed in small claims court against AT&T in 2007 nationwide.[7] AT&T never provided any evidence as to the nature of any of those claims.

In comparison, Consumers Union reported that the year AWS and Cingular merged, the companies had the worst records of customer complaints filed with the FCC.[8] Meanwhile, Consumer Watchdog, a non-profit consumer advocacy organization, received thousands of complaints from consumers like Ms. Coneff.[9] The *Coneff* class action was brought as a result of those complaints.[10]

Within 24 hours of the press announcement that *Coneff* had been filed, 1,800 AT&T customers contacted Consumer Watchdog with the same claims. As of March 2007, 4,700 complaints were received.[11] "No other legal action brought by [Consumer Watchdog]

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[6] Simon Decl. 2-3.

[7] Third Decl. of Neal Berinhout in Supp. of Cingular's Am. Mot. to Compel Arbitration 10-11, *Coneff*.

[8] Decl. of Kevin Coluccio in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration, Ex. S, *Coneff*.

[9] Decl. of Douglas Heller in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 2, *Coneff*.

[10] *Id.* at 2.

[11] *Id.* at 2-3.

has . . . resulted in such a tremendous number of complaints following the announcement of a suit."[12]

2. The *Coneff* plaintiffs submitted testimony from nine expert witnesses concerning the types of cases consumer lawyers handle on an individual basis. These experts all were extremely knowledgeable about the market for representation of individual consumers: they had principally represented consumers for many years; were active in professional organizations of consumer lawyers; regularly attended and provided legal education to other attorneys at consumer law conferences; and regularly referred consumer cases to other lawyers and had consumer cases referred to them. These experts also based their opinions on the *Coneff* complaint and the relevant arbitration clauses. In addition, a number of them reviewed discovery produced by AT&T and testimony submitted in support of AT&T's motion for individual arbitration. Every one of these experts testified that he or she would not represent the named plaintiffs in individual actions, either in court or in arbitration.[13]

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[12] *Id.* at 2.

[13] *See, e.g.*, Decl. of Peter Maier in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 13, *Coneff* ("I [would] be unwilling to take on an arbitration claim against [AT&T] for an individual customer . . . [and] it is very unlikely that any other private attorney in the State of Washington would be willing to do so."); Decl. of Dale Irwin in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 3, *Coneff* ("If I had been approached by a [plaintiff] in this case and asked to handle such a claim as made

(Continued on following page)

First, the experts testified that the small amount in controversy made the *Coneff* claims impractical to pursue individually:

- Attorneys cannot reasonably represent individuals with small claims on an hourly basis because "the hourly charge would . . . exceed the entire amount in controversy."[14] "No lawyer concerned with ethical propriety would be comfortable charging a client by the hour for such services."[15] Nor would attorneys accept such cases on a contingency fee basis, because the potential recovery does not justify the expense of prosecuting the case.[16] One expert had previously declined to represent two AT&T customers for that reason.[17]

- Even the simplest consumer cases require the completion of certain tasks (*e.g.*, interviewing the client, explaining the retainer, opening a file, analyzing evidence, and drafting a demand letter), the fees for which would far exceed the

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in the Complaint on an individual basis, I would not have accepted the case.").

[14] Decl. of Jerome Hartzell in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 5, *Coneff*.

[15] *Id.* at 9.

[16] *Id.* at 6-7.

[17] Decl. of Steven Fahlgren in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 2, *Coneff*.

amount in controversy for an individual AT&T customer.[18]

Second, the experts noted that, although the *Coneff* plaintiffs' claims are individually small, they are legally complex:

- Representing an individual consumer against AT&T would require analyzing the terms, scope, and governing law of the contract and arbitration clause.[19] Further, to survive a motion to dismiss, consumers would need to defeat complex legal defenses such as federal preemption.[20]

- The plaintiffs' claims would "require institutional and financial discovery and analysis" concerning AT&T's maintenance

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[18] Maier Decl. 6-7.

[19] Decl. of Mary Fons in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 3-4, *Coneff*.

[20] *Id.* at 4; *see also* Decl. of Stuart Rossman in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 7-8, *Coneff*. For example, AT&T has repeatedly argued that state consumer protection claims are preempted by the Federal Communications Act or barred by other complex defenses. *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053 (9th Cir. 2008); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004); *Phillips v. AT&T Wireless*, No. 4:04-CV-40240, 2004 WL 1737385, at *1 (S.D. Iowa July 29, 2004); *see also Riensche v. Cingular Wireless LLC*, No. C06-1325Z, 2007 WL 3407137, at *4 (W.D. Wash. Nov. 9, 2007) (claims barred by "voluntary payment doctrine").

of the AWS network following the merger.[21]

Third, AT&T confirmed that the so-called "premiums" in its arbitration clause are illusory. In response to direct questioning by the district court, AT&T's counsel responded: ***"If you're asking me how often are the premiums paid out, I don't think it happens."***[22] Consistently, the plaintiffs' experts explained that AT&T controls whether it pays the premiums:

- AT&T's contract gives the company 30 days to make a settlement offer, which "virtually ensures" that after the attorney has gone to the trouble of evaluating and investigating the case, interviewing the client, and opening a file, AT&T will pay just enough to escape the premiums.[23] Thus, any attorney considering whether to represent an AT&T customer would know she risks forfeiting her fees and costs after investing substantial time and resources.[24]

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[21] Fons Decl. 4.

[22] Transcript of Oral Arg. at 9, *Coneff* (emphasis added). Not surprisingly, AT&T failed to provide any evidence that it had ever paid the premiums. *See, e.g.*, Dep. of Neal Berinhout 131:13-17, *Coneff* ["hereinafter *Coneff* Berinhout Dep."]; Simon Decl. 1.

[23] Decl. of Marcus Viles 3, *Cruz*, 2008 WL 4279690. References hereinafter to evidence in *Cruz* will simply cite "*Cruz*."

[24] Hartzell Decl. 7-8; Maier Decl. 9-10.

- AT&T can easily game the premiums, "pursu[ing] a strategy of 'buying off' the strongest claims by making offers that are attractive to the consumer even after the arbitrator is selected."[25]

Fourth, the plaintiffs' experts testified that few if any of the *Coneff* class members would ever realize that they had legal remedies absent a class action:[26]

- Even if customers suspected their rights had been violated, few would have the "ability or sufficient knowledge" to pursue their case without an attorney.[27]
- AT&T's counsel conceded that consumers are unlikely to know their rights until they are "actually engaged in a dispute."[28]

[25] Maier Decl. 11.

[26] Maier Decl. 12; Decl. of Daniel Blinn in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 4, *Coneff*.

[27] Fons Decl. 5.

[28] *Coneff* Berinhout Dep. 190:22-24. The testimony submitted in *Cruz* echoed these concerns. As one expert with twenty years of experience representing consumers explained, "The chilling reality of AT&T's scheme is that by unilaterally scuttling and granting itself amnesty from Rule 23, AT&T, if successful, takes away one of this Court's most powerful tools – notice." Viles Decl. at 4.

Fifth, experts testified that class actions are essential to enforce consumer protection laws:

- The former Division Chief for Consumer Protection of the Washington Attorney General's office, who supervised more than 100 employees charged with responding to more than 250,000 consumer complaints each year, testified that her office lacked the resources to pursue the majority of cases.[29] Thus, they "relied on a private class action to correct the deceptive or unfair industry practice."[30]

- The former Chief of the Business and Labor Protection Bureau in the Massachusetts Attorney General's office testified that "these claims, even if meritorious, will not be litigated if they cannot be pursued on a class basis."[31]

Based on all of these factors, the plaintiffs' experts testified that AT&T's class action ban would

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[29] Decl. of Sally Garratt in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 2-4, *Coneff*.

[30] *Id.* at 5.

[31] Rossman Decl. 2, 6. Witnesses also testified that class actions filed against telecommunications corporations that compensated thousands of customers for wrongful charges and ended several unfair practices could not have been brought individually. Decl. of Alan Mansfield 2-3, *Coneff*; Decl. of Alan Plutzik 2-3, *Coneff*.

effectively bar the overwhelming majority of customers from seeking redress for wrongdoing like that alleged in the complaint.[32]

On May 22, 2009, after hearing all of the evidence, the district court in *Coneff* held that AT&T's class action ban was unenforceable under Washington law because it would "effectively exculpate [AT&T] from any potential liability for unfair or deceptive acts or practices." *Coneff*, 620 F. Supp. 2d at 1259.[33]

First, the court concluded that the alleged harm to each class member involved "small sums of money," which would be "dwarfed by the legal complexity presented by the facts alleged in Plaintiffs' complaint," including claims that "a multi-billion dollar corporation[ ] intentionally degraded AT&T's pre-existing wireless network in order to exponentially increase their profits by assigning small fees to customers switching to [the new] network." *Id.* The court credited the testimony of the plaintiffs' experts that attorneys could not feasibly represent individual consumers with these claims. The court found the testimony of consumer attorney and expert Jerome

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[32] Blinn Decl. 4; Fons Decl. 5; Garratt Decl. 7; Irwin Decl. 3, 6; Maier Decl. 14; Decl. of Bren Pomponio in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 3, *Coneff*.

[33] Under Washington law, like California law, a class action ban is exculpatory where it would "den[y] *large numbers* of consumers the protection of [law]" and "exculpate[ ] [the corporation] from liability for a *whole class* of wrongful conduct." *Scott*, 161 P.3d at 1003 (emphasis added).

Hartzell – that an attorney concerned with "ethical propriety" would not charge a client by the hour for such representation – "particularly compelling." *Id.*

Second, the court found as a factual matter that the "premiums" in AT&T's arbitration clause do not ensure a remedy, because AT&T is "in full control of insuring that [they are] never awarded." *Id.* at 1258.

Third, the court emphasized that the "tangible evidence" demonstrated that only an "infinitesimal" percentage of AT&T's customers had brought arbitrations or small claims against AT&T. *Id.* The court dismissed AT&T's argument that the plaintiffs might receive only a "nominal" benefit from a class action, emphasizing that one "primary purpose of a class action lawsuit is to allow private citizens to act as private attorneys general in protecting the public's interest." *Id.* at 1259 (internal quotations and citation omitted).

The court concluded that "customers are either unaware of their right to take advantage of these 'pro-consumer provisions,' or the customers have no incentive to bring their claims against AT&T given the prohibitively expensive costs of individual arbitration. In either circumstance, [AT&T is] utilizing the provisions in the [agreements] to effectively insulate [itself] from any potential liability for unfair or deceptive acts or practices." *Id.*

B. AT&T's Efforts to Counter the Factual Record in *Coneff* With "Expert" Testimony Were Unavailing.

While AT&T's claims in this Court that its arbitration clause is consumer friendly rest only on its own unsupported assertions, in *Coneff* and other cases in the lower courts it has repeatedly relied heavily on a single source: Vanderbilt University law professor Richard Nagareda.

After the *Coneff* lawsuit was filed, Evan Tager, AT&T's outside litigation counsel, contacted Professor Nagareda.[34] Nagareda had written a law review article in which he expressed his hostility to class actions generally,[35] and AT&T's general counsel Neal Berinhout had read Nagareda's writings and liked them.[36] During their initial consultation, Tager and Nagareda discussed the *Coneff* case.[37] AT&T was in the process of amending some features of its arbitration clause in preparation to file a motion to compel individual arbitration in *Coneff*, and Tager asked Nagareda if he would review the clause and prepare a declaration in support of that motion.[38] Nagareda

[34] Dep. of Richard Nagareda 48:20-24, *Coneff* [hereinafter "*Coneff* Nagareda Dep."].

[35] Decl. of Richard Nagareda in Supp. of Mot. to Compel Arbitration 2-4, *Coneff* [hereinafter "*Coneff* Nagareda Decl."].

[36] *Coneff* Berinhout Dep. 28:17-29:1.

[37] *Coneff* Nagareda Dep. 62:5-11.

[38] Dep. of Richard Nagareda 51:3-5, *Cruz* [hereinafter "*Cruz* Nagareda Dep."]; *Coneff* Berinhout Dep. 27:1-6.

agreed, in exchange for a $5,000 retainer and $500 per hour.[39]

AT&T now includes a declaration from Nagareda in support of its motion for individual arbitration whenever its customers try to initiate a class action.[40] As of March 2008, Nagareda had appeared as an expert for AT&T in at least 17 cases.[41] In each declaration, he has made a series of identical statements about AT&T's 2006 clause and testified that the clause is not unconscionable.[42]

Nagareda's depositions revealed, however, that his "expert" opinions have no foundation. He acknowledged that he is not an expert in consumer law.[43] He confessed that he has never once represented a consumer,[44] served as an arbitrator,[45] or even observed an arbitration.[46] During his three years practicing law, he never tried a case, appeared in court, or had primary responsibility for a case.[47] His

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[39] *Coneff* Nagareda Decl. 4.

[40] Dep. of Neal Berinhout 79:10-19, 81:1-3, *Cruz* [hereinafter "*Cruz* Berinhout Dep."].

[41] *Cruz* Nagareda Dep. 45:12-19.

[42] *E.g.*, *Coneff* Nagareda Decl. 4; Decl. of Richard Nagareda in Supp. of Mot. to Compel Arbitration 5, *Cruz*; *Cruz* Nagareda Dep. 68:9-17.

[43] *Cruz* Nagareda Dep. 34:20-21.

[44] *Id.* at 20:20-23, 35:15-16.

[45] *Id.* at 14:19-24.

[46] *Id.* at 15:5-7.

[47] *Id.* at 20:9-17; *Coneff* Nagareda Dep. 15:15-21.

only "experience" with the critical issue of how lawyers determine whether bringing a particular claim is economically feasible consists of "reading scholarly literature, law review articles, [and] books by other folks, as opposed to actually working with clients."[48] His "expertise" on class action bans, likewise, consists solely of having read "scholarly literature and the major appellate case law on waivers of class arbitration."[49] When asked how the enforceability of class action bans would be decided under the state law applicable in one case in which he testified, Nagareda replied, "I have no idea."[50]

Nagareda's praise for AT&T's arbitration clause fizzled under close questioning. For example, his declarations state that AT&T's clause "reduce[s] dramatically the cost barriers to the bringing of individual consumer claims."[51] But he admitted he was referring only to the costs of the arbitration proceeding itself, which he conceded could be minor compared to the costs of investigation and expert witnesses, especially in a case raising system-wide issues.[52]

Nor could Nagareda back up his broad claims about AT&T's class action ban. He theorized, for

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[48] *Coneff* Nagareda Dep. 17:21-18:3.

[49] *Id.* at 34:16-35:5.

[50] *Cruz* Nagareda Dep. 118:20-24; *see also id.* at 99:13-17.

[51] *Coneff* Nagareda Decl. 4.

[52] *Coneff* Nagareda Dep. 95:3-96:7.

instance, that enforcement of the ban would not repeal any cause of action or alter any "substantive rights."[53] However, when asked what causes of action the plaintiffs alleged in cases where he testified, he could not answer.[54] And when asked what rights AT&T's customers were seeking to vindicate, he responded, "I don't know."[55]

Indeed, Nagareda admitted that it was his practice to submit sworn declarations in cases without knowing even such basic facts as the claims in the operative complaint.[56] He defended his ignorance on grounds that the "specific factual setting" of a case is not "especially relevant."[57] At another point, however, he conceded that the class action ban in AT&T's 2006 clause *would* be unconscionable if "in a given situation" it amounted to a "repeal of [a] private right of action."[58]

Nagareda's declarations proclaim that he has "never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims."[59] But

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[53] *Cruz* Nagareda Dep. 100:3-6.

[54] *Coneff* Nagareda Dep. 43:18-44:1; *id.* at 45:15-23.

[55] *Cruz* Nagareda Dep. 99:24-100:2.

[56] *Id.* at 58:24-59:7, 68:18-24; *Coneff* Nagareda Dep. 43:18-44:1, 65:19-25.

[57] *Cruz* Nagareda Dep. 96:4-6.

[58] *Coneff* Nagareda Dep. 71:11-24.

[59] *Coneff* Nagareda Decl. 4.

he admitted at deposition that he did not write that statement,[60] and discovery confirmed that it was added to the declaration by counsel for AT&T.[61]

The heart of Nagareda's declarations is his "informed prediction" that the availability of the "premiums" in AT&T's clause is "likely" to result in high numbers of claims and high payouts to aggrieved customers.[62] But after actual data showed that only a tiny number of customers had filed arbitrations against AT&T under the 2006 clause – directly refuting his testimony – Nagareda continued to make the same "informed prediction[s]" he had made before the clause was implemented – including in the *Concepcion* case.[63]

The Court should not accept AT&T's insinuation in its question presented that its customers can vindicate their rights without class actions – or the "informed" speculations of Professor Nagareda and AT&T's *amici* that AT&T's class action ban does not

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[60] *Coneff* Nagareda Dep. 89.5-14.

[61] *Id.* Ex. 3 (email from Evan Tager to Richard Nagareda, Oct. 23, 2006).

[62] *Coneff* Nagareda Decl. 5.

[63] Decl. of Richard Nagareda in Supp. of Def. ATTM's Mot. To Compel Arbitration 7-8, *Laster v. AT&T Mobility, LLC*, No. CV 09-1590-GAF, 2009 WL 1765661 (C.D. Cal. June 18, 2009); *see also Cruz* Nagareda Dep. Exs. 26-27. The *Coneff* court was unpersuaded by Nagareda's speculations. 620 F. Supp. 2d at 1257. *See also Hall*, 608 F. Supp. 2d at 604 ("[I]n spite of Professor Nagareda's claim that [a fair market for settlement] would be created, no evidence exists that it in fact exists.").

immunize AT&T for wrongdoing. The evidence in *Coneff* proved otherwise.

II. THE FACTUAL RECORDS IN MANY CASES DEMONSTRATE THAT OTHER CORPORATIONS' CLASS ACTION BANS WOULD IMMUNIZE THEM FROM LIABILITY FOR WIDESPREAD VIOLATIONS OF STATE LAW.

The *Coneff* decision is hardly an outlier. Many courts have refused to enforce class action bans where the evidence demonstrated that the term would function as an exculpatory clause, notwithstanding vague assertions to the contrary such as those AT&T makes here.

In *Ting v. AT&T*, for example, a sister AT&T company stipulated that class action bans are sometimes exculpatory. 182 F. Supp. 2d 902, 918-19 (N.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 319 F.3d 1126 (9th Cir. 2003). After a full trial, the court issued a 74-page decision striking down AT&T's class action ban as unconscionable under California law. *Id.* at 930-31. Prior to AT&T's promulgation of its contract, consumers had brought several successful class actions against phone carriers. *Id.* at 917-18. In one case, AT&T paid 100% of the class members' damages; in another, a class recovered $88 million from a different carrier. *Id.* at 918. AT&T conceded that none of the lawyers in those cases would have brought them on an individual basis. *Id.* at 918-19. Relying on this and a wealth of other

evidence, the district court found that AT&T's class action ban "functions as an effective deterrent to litigating many types of claims . . . and, ultimately, would serve to shield AT&T from liability even in cases where it has violated the law." *Id.* at 918.

Another court recently held that the evidence established that a class action ban was exculpatory under the specific facts of a wage-and-hour class action. In *Gentry v. Superior Court (Circuit City)*, a customer service employee claimed that the company improperly designated the employees as managerial to avoid paying overtime. 165 P.3d 556, 559-60 (Cal. 2007). The trial court granted Circuit City's motion to compel individual arbitration. *Id.* at 560.

The California Supreme Court reversed, explaining that "in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." *Id.* at 559. The court emphasized that the state's wage and hour laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." *Id.* at 563 (citation omitted). Noting that class action bans "will only be invalidated after the proper factual showing," the court remanded the case. *Id.* at 570.

On remand, discovery revealed that, other than the named plaintiff, only *one* of the putative class members had ever challenged Circuit City's overtime policy. Decl. of Ellen Lake in Supp. of Pls.' Opp. to

Mot. to Compel Arbitration ¶ 7, *Gentry v. Circuit City Stores, Inc.*, No. BC280631, 2008 WL 8009240 (Cal. Super. Ct. Aug. 28, 2008). Moreover, between 1998 and 2008, only *two* California Circuit City employees had brought *any* claims in arbitration. *Id.* at ¶ 8.

In addition, several witnesses testified that the putative class members would not be able to secure counsel individually because of the small size of their claims. *Gentry*, 2008 WL 8009240. They testified to their first-hand experience that many employees become aware of their rights only after litigation commences. A former Division of Labor Standards attorney testified that corroborating witnesses in his investigations would frequently refuse to testify against their current employers for fear of retaliation. *Id.* The plaintiffs also submitted evidence from a certified public accountant, who had found that 75-80% of human resources personnel surveyed admitted they would not hire potential applicants who had brought a legal claim against a former employer, even if the claim was meritorious. Based on this factual record, the trial court reversed and found that the class action ban was exculpatory. *Id.*

Similarly, a North Carolina judge recently evaluated a robust factual record and held that a payday lender's class action ban was exculpatory. *Kucan v. Advance America*, No. 04-CVS-2860, 2009 WL 2115349 (N.C. Super. Ct. June 26, 2009). The record revealed that "there ha[d] never been any arbitration proceeding arising from this business" despite "the large number" of loans. *Id.* at ¶ 50. In addition,

seventeen attorneys – all accepted by the court as experts – testified that, "because the stakes of an individual arbitration on behalf of a payday borrower are so small, no attorney would represent a payday borrower claim on an individual basis," despite the availability of statutory attorney fees. *Id.* at ¶ 41. Financial experts testified that it would require between 65 and 100 hours of financial analysis to understand the lenders' scheme. *Id.* at ¶ 42. Two attorney experts testified in person and were extensively cross-examined. The court ultimately found it "unlikely an attorney would bring an individual case for a payday lending customer in court or arbitration due to the complexity of the cases and the lack of economic feasibility of such representation." *Id.* at ¶ 44. The court further found it "very unlikely an individual payday borrower could obtain Legal Aid or pro bono representation." *Id.* The court concluded that, if payday borrowers were required to proceed individually, they "would not be able to effectively prosecute the type of claims raised by plaintiffs here, even if the claims are legally justified and correct." *Id.* at ¶ 46. As a result, the court concluded that "the class action prohibition operate[d] as an exculpatory clause." *Id.* at ¶ 50.

In another payday lending case, a Florida court heard expert testimony that "it would be virtually impossible" for a borrower to find an attorney to represent her individually. *See* Evidentiary Hearing Tr., Dec. 17, 2007 at 39, *Betts v. McKenzie Check Advance of Florida, LLC*, No. CL 01-320-AI (Fla. 15th

Jud. Cir., Jan. 4, 2008) (testimony of Lynn Drysdale). The expert had worked for 20 years as a legal aid attorney. Her testimony was based on extensive experience attempting to find counsel for payday borrowers faced with abusive debt collection methods, the complexity of the area of law, the absence of significant statutory guidance on loan transactions, the small amounts involved in the type of case, and the resources required to bring a claim. *Id.* Based on this and other testimony, the trial judge held the lender's class action ban unenforceable. *See Betts*, No. CL 01-320-AI, Slip Op. at 5.

Similarly, in *Brewer v. Missouri Title Loans, Inc.*, ___ S.W.3d ___, No. 90647, 2010 WL 3430411 (Mo. Aug. 31, 2010), the Missouri Supreme Court affirmed a trial court's decision that an extensive factual record proved a lender's class action ban was exculpatory. The named plaintiff had obtained a $2,215.00 title loan and was charged over $500 in interest – an annual rate of over 300 percent. *Brewer v. Missouri Title Loans, Inc.*, No. ED 92659, 2009 WL 4639899 (Mo. Ct. App. Dec. 8, 2009). The trial court held an evidentiary hearing where it heard testimony from three experts on the market for consumer representation. The experts testified that the chances of an individual plaintiff locating an attorney were "virtually nil" due to low damages and the likelihood of a "heavily defended" defendant. 2010 WL 3430411, at *4. As a result of this evidence, the Missouri Supreme Court concluded that the class action ban would leave

consumers "with no meaningful avenue of redressing complicated statutory and common law claims." *Id.*

Finally, the First Circuit recently addressed a class action ban in an antitrust case. In *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), the court found that the evidence sharply contradicted abstract arguments about the supposed efficiency of individual arbitration. Cable customers alleged that Comcast was consolidating its market position through anti-competitive swapping agreements. *Id.* at 30. They "provided uncontested and unopposed expert affidavits demonstrating that without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all." *Id.* at 58. The experts included an attorney with twenty-six years of experience litigating antitrust class actions, a former judge, and an economist. Their testimony persuaded the court that it would be "completely unrealistic and impractical" for an individual plaintiff to retain expert witnesses, without whom a plaintiff's case would be "extremely compromised, and effectively precluded." *Id.*

These cases confirm the teaching of the evidence and holding in *Coneff*. When a full factual record is developed, the great weight of the admissible evidence has shown that without a class action, many consumers would be effectively left with no remedy – and corporations would be immunized from liability for widespread violations of law.

III. ENFORCING CLASS ACTION BANS THAT WOULD PERMIT WIDESPREAD VIOLATIONS OF STATE LAW WOULD GUT STATE CONSUMER PROTECTION LAWS AND LEAVE CONSUMERS WITHOUT ADEQUATE PROTECTION.

As the factual records in *Coneff* and the cases above demonstrate, enforcing class action bans in some circumstances would exculpate a corporation from liability to the vast majority of its customers. AT&T does not dispute this. Rather, AT&T and its *amici* claim that, so long as the company is not immunized from "*all* liability," its class action ban does not offend state law as properly applied, AT&T Br. 47 (emphasis added) – and that in any event, federal and state regulators will adequately protect consumers. That is wrong on both counts.

First, state consumer protection laws were enacted not merely to ensure that a handful of highly motivated individuals can get their money back; they exist to protect the public at large and to deter and remedy *widespread* unlawful conduct. AT&T's proposed rule would gut that central purpose by permitting corporations to exclude all but a tiny subset of consumers from the protections of state law. This would render many state consumer protection laws a dead letter.

Second, the U.S. government's own studies show that the federal and state regulators are failing to curb wireless companies' most rampant abuses.

AT&T's request to be policed only by those agencies is a plea for near-total immunity.

A. State Consumer Protection Laws Are Aimed at Protecting All Consumers.

For nearly forty years, States have relied on consumer protection statutes as their principal means of protecting consumers from deception, cheating, and other abuses. These state laws were designed to create a private right of action and to stop widespread wrongful conduct -- purposes that have nothing whatsoever to do with arbitration. AT&T urges this Court to hold that the Federal Arbitration Act ("FAA") permits businesses to ban class actions even when, as a factual matter, it would mean permitting those businesses to continue cheating the vast majority of their customers. That proposed rule would radically undermine state consumer protection laws.

To more clearly see the rule AT&T urges this Court to adopt, imagine that AT&T illegally overcharges 100,000 customers by $50 apiece. Imagine further that only 100 of those customers (a) realize they have been cheated; (b) know their legal rights under state consumer protection laws; (c) get angry enough to try to get their money back; and (d) are able to find a lawyer to represent them or proceed on their own against the multinational corporation. AT&T wants this Court to hold as a matter of federal law that so long as AT&T's arbitration clause

provides a reasonable probability that the 100 people who manage to accomplish steps (a) through (d) can obtain a refund, the FAA preempts state laws protecting the other 99,900 consumers.

AT&T's proposed rule would reverse decades of progress States have made in protecting consumers from widespread abuses by businesses. When Congress passed the Federal Trade Commission ("FTC") Act in 1914, it ushered in the first federal regulation of certain deleterious corporate practices. *See* FTC Act, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914), *codified as amended at* 15 U.S.C. § 41-58 (2000). However, one major shortcoming sharply limited the statute's effectiveness – it had no private right of action. *See, e.g., Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974). The FTC itself repeatedly argued that a private right of action would ensure meaningful enforcement of the Act by "encourage[ing] consumers to act as 'private attorneys general' to police business practices," G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 N.W. L. Rev. 1198, 1213-14 (1988), but no private right of action was ever added.

Into this gap stepped the States, in "one of the most successful law reform efforts of its kind." *Id.* During the 1960s and 1970s, almost every State passed a statute outlawing unfair or deceptive practices. *See* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724 (1972). Because of the enforcement problems that plagued

federal regulation and the inability of attorneys general to pursue every case involving an unfair or deceptive act or practice, *see, e.g.*, *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 776 (Mass. 1975) (state attorney general's inability to handle all complaints was primary motivation for enacting private right of action), state laws expressly provided a private right of action. *See* Mary Dee Pridgen, *Consumer Protection and the Law* § 3:2 (2007).

As state legislatures and courts have made clear, the private right of action created by state consumer protection laws is intended to stop widespread abuses, not merely to enable individual redress. For example, the Washington Supreme Court emphasized that consumers bringing actions under the state's Consumer Protection Act "do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests." *Scott*, 161 P.3d at 1006. Likewise, the Oregon Supreme Court has held that the Oregon Unlawful Trade Practices Act is "designed to encourage private enforcement" of the Act's standards of trade and public policies "as much as to provide relief to the injured party." *Weigel v. Ron Tonkin Chevrolet Co.*, 690 P.2d 488, 493 (Or. 1984). Florida courts have repeatedly emphasized that Florida's consumer protection law "does not exist solely for the benefit of the individual parties, [but] is instead designed to afford a broader protection to the citizens of Florida." *Am. Online, Inc. v. Pasieka*, 870 So. 2d 170, 171-72

(Fla. Dist. Ct. App. 2004). In California, the high court has held that California's Unfair Competition Law "focus[es] on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009).

The Colorado Supreme Court likewise recognized that the state's consumer protection law "serves more than a merely restitutionary function" for injured customers – instead, its "primary purpose" is "deter[ring] and punish[ing] deceptive trade practices." *Hall v. Walter*, 969 P.2d 224, 231 (Colo. 1998). Similarly, Ohio courts "safeguard the [Ohio Consumer Sales Practices Act]'s remedial and deterrent functions" by exposing and discouraging deceptive trade practices. *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1170 (Ohio Ct. App. 2004). *See also Furst v. Einstein Moomjy, Inc.*, 860 A.2d 435 (N.J. 2004) (New Jersey law seeks "not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices").[14] By striking down exculpatory class action bans,

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[14] *See also, e.g.*, Vt. Stat. Ann. Tit. 9 § 2451 (purpose of Act is "to protect the public"); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519 (4th Cir. 1999) ("[North Carolina's Unfair Trade Practices Act's] primary purpose is to protect the consuming public"); *Am. Car Rental, Inc. v. Comm'r of Consumer Protection*, 869 A.2d 1198, 1207-08 (Conn. 2005) ("The purpose of the [Connecticut Unfair Trade Practices Act] is to protect the public"); *Agliori v. Met. Life Ins. Co.*, 879 A.2d 315, 318 (Pa.

(Continued on following page)

see parts I and II, courts have ensured that state consumer protection laws and the private right of action fulfill their intended purpose.

In sum, AT&T's characterization of state consumer protection laws as designed merely to permit individual consumers to seek redress, *see* AT&T Br. 36, 45, is flatly wrong. A rule allowing corporations to contractually limit the effectiveness of those state laws would affect a radical incursion into state laws that are unrelated to arbitration.

B. Federal and State Regulators Do Not Protect Consumers from Widespread Violations of Their Rights by Telecommunications Corporations.

AT&T and its *amici* suggest that severely limiting private enforcement of consumer protection laws is not problematic because federal and state regulators will adequately protect consumers. *See, e.g.*, Am. Bankers Ass'n Br. 26. Nothing could be further from the truth.

Super. Ct. 2005) ("The purpose of the [Pennsylvania] Unfair Trade Practices and Consumer Protection Law (UTPCPL) is to protect the public."); *HBN P'ship v. Schappe*, 532 N.W.2d 144 (Wis. App. 1995) (Wisconsin's consumer protection act "was enacted to protect the public").

Millions of Americans now rely on wireless phones as their primary means of telephone communications. Meanwhile, government reports reveal that, although cell phone providers elicit more consumer complaints than any other industry, the principal agency responsible for protecting consumers – the Federal Communications Commission ("FCC") – is not up to the task.[65]

High incidences of cheating, scams, and overcharges in the telecommunications industry have been documented by consumer advocates. For example, companies have been caught imposing rate increases under the guise of ostensibly government-mandated "regulatory cost recovery charges."[66] In a class action against AT&T, a jury awarded nearly $17 million to California long-distance customers, finding that the company had fraudulently inflated the universal service fees designed to fund service for Americans in rural and poor communities.[67] Similarly,

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[65] *See generally* Respondents' Br. 5-6 (detailing increasing consumer complaints about "bill shock," deceptive contracts, early termination fees, etc.).

[66] *See Consumer Wireless Issues: Hearing Before the Subcomm. on Comme'ns of the S. Comm. on Commerce, Sci., and Transp.*, 110th Cong. (2007) (testimony of Patrick Pearlman, Deputy Consumer Advocate, Pub. Serv. Comm'n of W. Va.), *available at* http://commerce.senate.gov/public/index.cfm?p=Hearings (browse by hearings in Oct. 2007, then follow link for *Consumer Wireless Issues*) [hereinafter "Pearlman testimony"].

[67] *See* PRNewswire, *Jury Awards $17M to California Residents in AT&T Class Action*, Reuters, Nov. 20, 2008, http://www.reuters.com/article/idUS222951+20-Nov-2008+PRN20081120.

AT&T charged Washington customers for "roaming," despite the fact that their contracts promised no roaming charges.[68] And AT&T charged Florida customers a monthly fee for an optional "roadside assistance" service that they never ordered.[69]

Despite these widespread abuses, AT&T and its *amici* insist that consumer class actions are not needed to keep cell phone companies in check, because government agencies will step in. For example, the American Bankers Association argues that "if [AT&T] were to impose an unreasonable charge or engage in any unjust or unreasonable practice, [the FCC] would have broad authority" to investigate, adjudicate consumer complaints, issue rulings ordering the company to pay damages, and assess forfeitures. Am. Bankers Ass'n Br. 22; *see also* Chamber Br. 6. AT&T's *amici* also argue that state utility commissions have authority to compel wireless companies to comply with state law.

Those claims are flatly contradicted by the federal government's own data. According to a 2009 report issued by the U.S. Government Accountability Office ("GAO"), the "FCC lacks the authority to compel a carrier to take action to satisfy many consumer complaints."[70] Despite the FCC's status as the primary

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[68] *Scott*, 161 P.3d 1000.

[69] *Cruz*, 2008 WL 4279690.

[70] GAO, *Telecommunications: FCC Needs to Improve Oversight of Wireless Phone Service* 20 (2009), *available at*

(Continued on following page)

federal agency charged with overseeing the telecommunications industry, it has "refrained from regulating wireless phone service" and instead has taken a "'light touch' in regulating the industry."[71]

The FCC receives thousands of informal complaints from wireless consumers every year, but all it does is forward the complaints to the companies.[72] As long as the company "responds" in some way, the FCC considers the complaint resolved.[73] Except for forwarding complaints, the FCC "conduct[s] little additional oversight of . . . wireless service carriers."[74] The FCC does not track whether problems are ever resolved to the consumer's satisfaction.[75] Indeed, the GAO concluded that "it is not clear whether resolving problems is an intended outcome of FCC's consumer complaint efforts."[76]

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http://www.gao.gov/new.items/d1034.pdf [hereinafter "*Wireless Phone Service*"].

[71] *Id.* at 21, 23.

[72] Few consumers with complaints even bother going to this ineffective agency in the first place. *Id.* at 18 (only 13% of customers would complain to FCC if company failed to resolve problem). As explained to a congressional subcommittee, "Consumers are not stupid. They are unlikely to bother agencies to register complaints that they know the agencies cannot, or will not, take meaningful action to address." Pearlman testimony at 8.

[73] *Wireless Phone Service* at 16.

[74] *Id.* at 15.

[75] *Id.* at 16, 20, 24.

[76] *Id.* at 20. Although consumers also have the option of filing a formal complaint, few consumers use that process

(Continued on following page)

Even though problems with billing, service, early termination fees, and marketing are consistently among the top five categories of consumer complaints,[77] the FCC has steadfastly declined to bring enforcement actions to address these concerns.[78] Likewise, the FCC has no rules addressing contract terms, explanation of service terms, call quality, or customer service.[79] And the FCC has never conducted any formal investigation of companies' compliance with truth-in-billing rules.[80] When the FCC does investigate, it closes 83% of investigations without taking any enforcement action.[81]

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because it requires a filing fee. *Id.* at 15 n.31. In fact, the FCC held only one proceeding in response to a formal complaint from a consumer in the five years prior to the GAO report. *Id.*

[77] *See, e.g.*, FCC, *First Quarter 2010 Report on Informal Consumer Inquiries and Complaints* 1-2 (2010), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0813/DOC-300795A1.pdf.

[78] The FCC's web site lists no enforcement actions against wireless carriers concerning early termination fees, billing, or service. FCC, Working for You, http://www.fcc.gov/eb/tcd/working.html (last visited Sept. 21, 2010). The agency has not undertaken any enforcement actions involving marketing since 2003. FCC, Marketing Enforcement Actions, http://www.fcc.gov/eb/tcd/mktg.html (last visited Sept. 21, 2010).

[79] *Wireless Phone Service* at 22.

[80] *Id.* at 25.

[81] GAO, *Telecommunications: FCC Has Made Some Progress in the Management of Its Enforcement Program but Faces Limitations, and Additional Actions Are Needed* 3 (2008), *available at* http://www.gao.gov/new.items/d08125.pdf.

Meanwhile, most state utility commissions do not regulate wireless phone service at all,[82] and *only five* state commissions reported taking *any* enforcement action against a wireless provider in a five-year period.[83] Many commissions reported to the GAO that while state law appears to give state agencies some authority to regulate cell phone companies, the industry has vigorously opposed such regulation on grounds of federal preemption.[84]

Consumers cannot depend on federal or state regulators to protect their interests. The state consumer protection laws that AT&T's proposed rule would gut are, in many cases, the only meaningful remedy available to consumers.

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[82] *Wireless Phone Service* at 27.

[83] *Id.* at 30.

[84] *Id.* at 31, 33-34; *see also* Pearlman testimony; *Consumer Wireless Issues: Hearing Before the Subcomm. on Comme'ns of the S. Comm. on Commerce, Sci., and Transp.*, 110th Cong. (2007) (testimony of Lori Swanson, Minn. Attorney General) (State enacted "Consumer Protections for Wireless Customers" Act, but statute was struck down as preempted before it could take effect), *available at* http://commerce.senate.gov/public/index.cfm?p=Hearings (browse by hearings in Oct. 2007, then follow link for *Consumer Wireless Issues*).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals affirming the district court's denial of AT&T's motion to compel individual arbitration should be affirmed.

Respectfully submitted,

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October 6, 2010

AMICUS CURIAE BRIEF

No. 09-893

In The Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safe-guards guaranteed by our Constitution.

CAC assists state and local officials in upholding valid and democratically enacted measures and historic common law remedies. CAC filed an *amicus* brief in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), and *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314; over the last decade, CAC's predecessor organization, Community Rights Counsel, filed *amicus* briefs in preemption cases before this Court in support of many state and local laws.

CAC seeks to preserve the careful balance of state and federal power established by the Constitution, including its Amendments. CAC thus has a strong interest in this case and the development of preemption law generally.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

AT&T's argument that the Federal Arbitration Act (FAA) preempts application of California's generally applicable contract law to bans on class-actions contained in arbitration agreements bans is contrary to the Constitution's text and history, as well as fundamental principles of federalism.

First, AT&T asks the Court to preempt California's generally applicable contract law based not on the text of the FAA—which expressly saves state contract law that does not discriminate against arbitration—but on a pro-arbitration "purpose" inferred from the Act. However, the text of the Supremacy Clause makes "supreme" the "*Laws* of the United States . . . made in Pursuance [of the Constitution]," U.S. CONST. art. VI, cl. 2 (emphasis added), not vague inferences about what Congress meant to achieve by passing those laws. Displacing state law for broad, implied purposes—especially where a statute contains a savings clause indicating that state law should be preserved—is contrary to the clear text of the Constitution.

Second, this Court has repeatedly warned against relying on supposed "purposes" or "objectives" of a statute, not only because it is far more appropriate to apply statutes based on their plain text, but also because divining the "purposes" of legislation is a questionable enterprise in the first place. Statutes may embody "countless policies," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990), and "[i]t is at best

dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions," *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring). Indeed, the legislative history of the FAA shows that at least some members of Congress were not interested in enacting a substantive law applicable in state courts, intending instead to create a rule of procedure applicable only in federal courts. And the existence of the FAA's savings clause suggests that lawmakers were so concerned about preserving state contract law that they wrote such protection directly into the text of the statute. In general, state law should not be displaced based on fuzzy notions about the policies, objectives, or motives behind a federal legislative enactment—especially when one could easily pluck contradictory "purposes" out of the same legislative history.

Finally, the thinly veiled and entirely unsupported suspicion that AT&T and its *amici* harbor about the good faith of the California Supreme Court and its application of state contract law to class-action bans in arbitration agreements—suggesting that the state's nominally neutral contract law is at heart hostile to arbitration—runs contrary to our constitutional system of federalism. The Supremacy Clause must be applied in a way that preserves the balance of power established by our Constitution: preempting state contract law based on little more than skepticism, suspicion, and pro-arbitration "policy" fails to honor the Constitution's federalist design.

This Court has repeatedly held that comity and respect require federal courts to defer to a state court's interpretation of state law absent extreme circumstances. The fact that courts applying the general contract law of at least twenty states have held that bans on employees or consumers seeking class-wide relief may be unenforceable in any forum make it absolutely clear that no such extreme circumstances exist in this case.

The FAA expressly leaves to the states the question of whether a provision in an arbitration agreement runs afoul of generally applicable state contract law. The ruling in this case fits easily within this savings clause. While the FAA prohibits the states from discriminating against arbitration, it does not prevent states from applying generally applicable contract laws aimed at protecting consumers and holding corporations accountable for misconduct.

ARGUMENT

I. THE TEXT OF THE FEDERAL ARBITRATION ACT DOES NOT SUPPORT PREEMPTION OF CALIFORNIA'S UNCONSCIONABILITY LAW, WHICH SHOULD NOT BE DISPLACED BASED ON VAGUE PURPOSES OR OBJECTIVES

The Constitution's text and history support implied preemption only in circumstances in which there is a direct conflict between a state law or

remedy and federal law. The Supremacy Clause of the Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. The Court has applied the Supremacy Clause to preempt state laws that conflict with federal law. *E.g., Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (explaining that federal preemption occurs "by direct operation of the Supremacy Clause").

The text of the Supremacy Clause makes "supreme" the "*Laws* of the United States . . . made in Pursuance [of the Constitution]." U.S. CONST. art. VI, cl. 2 (emphasis added). Accordingly, displacing state law for broad, implied purposes or general policy reasons is contrary to the clear text of the Clause. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (Thomas, J., concurring in the judgment). Article VI allows preemption of state law only by enacted federal *law*, which requires express agreement among two legislative houses and two democratically-elected branches of government. *See* U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S.

919, 951 (1983) (holding that courts may not give effect to law that did not follow the "single, finely wrought and exhaustively considered, procedure[s]" specified in the Constitution); *see also Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed.").

As this Court held in *Gregory v. Ashcroft*, in traditional areas of state regulation—such as contract law—"[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal citations and quotation marks omitted)). The Federal Arbitration Act (FAA) "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr., Univ.*, 489 U.S. 468, 477 (1989). Instead, the text of the FAA provides that arbitration agreements will be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has explained that, pursuant to this savings clause, states may not discriminate against arbitration as such, but "may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). With its use of the term "at law or in equity," the

savings clause specifically envisions and preserves a role for state courts in applying these contract law principles.

As part of California's "general contract law principles," the courts have held that class-action bans in adhesion contracts that effectively exculpate defendants from liability are unconscionable and unenforceable—regardless of whether these bans occur in arbitration agreements or other contracts. *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1112 (Cal. 2005) ("[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory . . . does not specifically apply to arbitration agreements, but to contracts generally."). *See generally* Resp. Br. at 17-24 (explaining California law). California law does not treat arbitration agreements "in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Accordingly, under the plain text of the FAA's savings clause, California's general contract law disapproving class-action bans in circumstances in which they serve to insulate a party to the contract from misconduct should not be preempted. *Id.* (in determining whether the FAA preempts state law, "the text of § 2 provides the touchstone").

AT&T, however, asks the Court to apply the implied purposes-and-objectives preemption doctrine, relying on this Court's statements that the FAA embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Certainly, Congress enacted the United States Arbitration Act, the initial title of what would become known as the FAA, "for the express purpose of making 'valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.' " *Stolt-Nielsen S.A., et al. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (quoting 43 Stat. 883). But this purpose does not trump the text of the statute, which preserves generally applicable state contract law in § 2. *Cf. 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009) (clarifying that the Court overruled the "old judicial hostility to arbitration" found in *Wilko v. Swan*, 346 U.S. 427 (1953), based on the text of the federal statute, and "not because of a policy favoring arbitration" (internal citations and quotation marks omitted)).

In addition, applying statutes based on alleged purposes or objectives behind the legislation is inherently a fatally flawed approach. *E.g.*, *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 677-78 (2003) (Thomas, J., concurring) (noting, in the context of the Medicaid Act, "the futility of discerning one 'purpose' " from the Act, "the impossibility of defining 'purposes' in complex statutes," and the "danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others."); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 908 n.22 (2000) (Stevens, J., joined by Souter, Thomas, and Ginsburg, JJ., dissenting)

(explaining that allowing preemption on "purpose frustration" grounds raises "the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in finding pre-emption based on frustration of purposes"); *Thompson*, 484 U.S. at 192 (Scalia, J., concurring) (noting that "[i]t is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions"); Kenneth Starr, et al., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE, 36 (ABA 1991) (criticizing the "purpose inquiry" in preemption cases because "a complex of competing legislative policies can be undermined").

The dangers in seeking to discern a single legislative purpose behind a statute are well illustrated by the FAA itself. While it is unquestionably true that Congress passed the FAA to remedy situations in which "courts traditionally viewed arbitration clauses as unworthy attempts to 'oust' them of jurisdiction," *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009), and refused to order enforcement of agreements to arbitrate, the legislative history of the FAA can be read to support diverse purposes—many of which are at odds with the objectives AT&T seeks to further in this case.

For example, there is a significant body of legislative history that suggests that the FAA was intended to create a procedural rule applicable only in federal courts, not a substantive rule displacing state law. *E.g.*, H.R. Rep. No. 96, 68th Cong., 1st

Sess. 1-2 (1924) (summarizing the ouster rule and explaining that the proposed federal arbitration "bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement"); Arbitration of Interstate Commercial Disputes, Hearing on H.R. 646 and S. 1005 before the Joint Committee of Subcommittees on the Judiciary, 68th Cong., 1st Sess. 39-40 (1924) (statement by Julius Cohen, the American Bar Association member who drafted the bill, explaining that "[t]here is no disposition . . . by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement"). *See also Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting) (arguing that the FAA does not apply in state court); *id.* at 286-96 (Thomas, J., dissenting) (same); *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting) (asserting that "[o]ne rarely finds a legislative history as unambiguous as the FAA's," which "establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts").

Some observers have expressly contested the idea that the FAA can preempt substantive state law, arguing that "[t]he idea that the FAA would apply in state courts or preempt state law was beyond the contemplation of Congress; it simply did not arise in the legislative history of the Act." David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67-SPG LAW & CONTEMP. PROBS. 5, 18 (2004). As Justice Thomas

argued in his dissent in *Allied-Bruce*, "the text of the [FAA] makes clear that § 2 was not meant as a statement of substantive law binding on the States," and was not "understood to 'creat[e] federal substantive law requiring the parties to honor arbitration agreements,' " 513 U.S. at 291 (quoting *Southland*, 465 U.S. at 15 n.9). Noting that principles of federalism require federal courts to be "absolutely certain" that Congress intended to preempt state law before doing so, *Gregory*, 501 U.S. at 464, Justice Thomas concluded: "Far from being 'absolutely certain' that Congress swept aside these state rules [regarding predispute arbitration agreements], I am quite sure that it did not." *Allied-Bruce*, 511 U.S. at 293.[2]

AT&T's pro-arbitration "policy" preemption argument, Pet'r Br. at 22, is thus founded on "generalized notions of congressional purposes that are not contained within the text of federal law," *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring). Indeed, not only are these policy notions absent from the text of the FAA, but, as the discussion above demonstrates, there is also significant disagreement over whether broad preemption of state law can even be *inferred* from the text or derived from the statute's legislative history.

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[2] In addition, the legislative history of the FAA can be read to indicate an intent not to apply the arbitration act to labor or employment contracts, although this Court's precedent holds otherwise. *Compare Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 466-67 (1957) (Frankfurter, J., dissenting), *with Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

Following the text of the FAA, as the Constitution—and prudence—require, California's generally applicable unconscionability law is not preempted.

II. PRINCIPLES OF FEDERALISM COUNSEL AGAINST SECOND-GUESSING THE CALIFORNIA COURTS' EXPLICATION OF CALIFORNIA CONTRACT LAW

The broad implied preemption argument embraced by Petitioner and its *amici* is not only contrary to the text and history of the Supremacy Clause, it also risks upsetting the Constitution's carefully crafted federal-state balance of power. This implied preemption argument relies not only on inferences about the purposes and objectives of the FAA, but also upon improper and inaccurate suppositions about the motivation and genuineness of the courts applying state contract law.

The Constitution's text and structure evidence great respect for the role of the states. As this Court has long recognized, the enumeration of powers in Article I, reinforced by the Tenth Amendment, make clear the intent to preserve the authority of states, thereby "assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; [] increas[ing] opportunity for citizen involvement in democratic processes; [and] allow[ing] for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458.

The Supremacy Clause serves an important function in establishing the proper relationship between the federal government and the individual states in our Constitution's federalist system. In order to have a workable union, the Constitution's framers recognized the need to delineate when federal power displaced state authority to regulate the same subject. As James Madison noted, because the Articles of Confederation lacked a federal supremacy rule, "[w]henever a law of a State happened to be repugnant to an act of Congress," it "will be at least questionable" which law should take priority, "particularly when the latter is of posterior date to the former." James Madison, *Vices of the Political System of the United States* (Apr. 1787) 9 PAPERS OF JAMES MADISON 345, 352 (Robert A. Rutland & William M.E. Rachal eds., 1975). The Supremacy Clause cured this defect. *See* Viet D. Dinh, *Reassessing the Law of Pre-emption*, 88 GEO. L.J. 2085, 2087-88 (2000) (describing the Supremacy Clause as a "constitutional choice of law rule . . . that gives federal law precedence over conflicting state law").[3]

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[3] The Supremacy Clause also gave structure to our constitutional federalism by ensuring that valid treaties and federal statutes would be treated by the states as part and parcel of their own law, and not as the law of a foreign sovereign. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1510 (1987); *see also* Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 559 (2003). This aspect of the Supremacy Clause corrected deficiencies in the Articles of Confederation, which granted law and treaty-making power to the United States Congress, but failed to make clear that these acts were automatically effective in the States. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9

As Chief Justice John Marshall observed, "[i]n our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 204-05 (1824). Because the Supremacy Clause effects the displacement of states' sovereignty in certain circumstances, "in order to protect the delicate balance of power mandated by the Constitution, the Supremacy Clause must operate only in accordance with its terms." *Wyeth*, 129 S. Ct. at 1206 (Thomas, J., concurring). When the Constitution authorizes the federal government to act, and any assertion of state authority on that subject would be inconsistent with or repugnant to the constitutional delegation of power to the federal government, then state law is preempted. *See Federalist* No. 32, pp. 194-96 (Alexander Hamilton), *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961) (citing the Uniform Rule of Naturalization Clause as an example where the Constitution's grant of power to regulate must be exclusive). But the Constitution requires more than inconvenience or expediency to displace state power preserved under the Constitution. *Id.* at 196.

PAPERS OF JAMES MADISON 345, 352 (noting that in general "the acts of Cong[res]s [under the Articles of Confederation] . . . depen[d] for their execution on the will of the state legislatures").

This Court in *Gibbons v. Ogden* held that state laws should be preempted when they "interfere" with federal law. *Gibbons*, 22 U.S. (9 Wheat.) at 205. In the instant case, the general California contract law applied below does not "interfere" with the FAA: it applies to arbitration and non-arbitration contracts alike, in keeping with § 2 of the FAA. While AT&T has suggested that the California Supreme Court has twisted the state's law to reach the "novel" decision that class-action bans in arbitration agreements may be found unconscionable, *see* Pet'r Br. at 20, 32, 47, this decision is in fact not novel—the law of twenty other states is in agreement with that of California, *see* Resp. Br. Addendum.

This Court is appropriately reluctant to second-guess a state supreme court's articulation of its own state law. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). This deference to state courts is particularly called for in preemption cases and when the federal law itself carves out a role for state court decisions "at law and in equity." "[S]tate courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and the California Supreme Court reasonably held that state law regarding the general unconscionability of class-action bans in contracts of adhesion applied to arbitration clauses as well. *See* Resp. Br. at 38-47 (demonstrating the reasonableness of the California Supreme Court's *Discover Bank* decision, which the Ninth Circuit applied below).

The carefully crafted balance of power in the Constitution's federal system should not be disturbed based solely on skepticism that state courts are not faithfully applying their own law. While "extreme circumstances" such as "obvious subterfuge," *Mullaney*, 421 U.S. at 691 n.11, might warrant looking past a state ruling on state law, generally, the Supremacy Clause "must operate only in accordance with its terms," *Wyeth*, 129 S. Ct. at 1206 (Thomas, J., concurring), which requires that a state law "conflict[] with the text of the relevant federal statute." *Id.* at 1208. Because the California Supreme Court's articulation of its generally applicable contract law falls within the savings clause of the FAA's § 2, the Ninth Circuit's application of California law below should not be preempted.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-893

In the

Supreme Court of the United States

AT&T Mobility LLC,

Petitioner,

v.

Vincent and Liza Concepcion,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICI CURIAE*

Amici curiae are professors of contract law.[1] Based on their many years of experience teaching and publishing in the field of contracts, *amici* write to correct the account of contract law presented by AT&T Mobility ("ATTM") and its *amici* in this case. ATTM and its *amici* claim that courts in California—and by extension courts applying the law of nineteen other states—have "distorted" contract doctrine by finding class action bans in adhesion contracts to be unconscionable. However, ATTM and its *amici* fault these courts for failing to follow a version of the unconscionability doctrine that simply does not exist. This brief explains why it is ATTM and its *amici* that have distorted traditional contract principles.

SUMMARY OF ARGUMENT

This is a case about what the unconscionability doctrine is, not what ATTM and its *amici* want it to be. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Courts will invalidate clauses that are procedurally unconscionable ("hidden and unexpected" or "arising from unequal bargaining

[1] No counsel for a party authored this brief in whole or in part, and no such counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

power") and substantively unconscionable ("one-sided, unreasonable, and lack[ing] justification"). *Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 925 (Cal. 1985).

By empowering courts to strike down these terms, the unconscionability doctrine serves two purposes that are vital to the coherence of modern contract law. First, it preserves the role of mutual assent—contract's foundational principle—in the context of unilaterally-dictated, mass-produced adhesion contracts such as AT&T's. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d. (noting that customers do not "assent or appear to assent" to "unfair terms" in adhesion contracts). Second, it prevents drafters from using fine print as a shield against liability, reducing their incentives to conform to the law, and rewriting their core duties to consumers into "guarant[ees of] nothing." *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 125 (Ct. App. 1982) (voiding warranty disclaimer).

From these principles, it follows that class action bans in adhesion contracts can be unconscionable —whether they relate to arbitration or not. As the California Supreme Court explained in *Discover Bank v. Superior Court*, 113 P.2d 1100 (Cal. 2005), class action bans can be unconscionable for the same reasons that disclaimers of warranties and other one-sided terms can be unconscionable: they "serve[ ] as a disincentive for [drafters] to avoid the type of conduct that might lead to class action litigation in the first place," and thus grant "a license to push the boundaries of good business practices to their furthest limits." *Id.* at 1108 (quoting *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002)).

Nevertheless, AT&TM contends that what it calls "California's rule" "bears no resemblance whatever to the traditional unconscionability principles that apply to contracts generally," and thus constitutes a special rule that governs "only . . . arbitration agreements." Brief for Petitioner ("AT&TM's Brief") at 18. AT&TM does not mention that "California's rule" is also far and away the *leading* rule: courts applying the law of nineteen other states have also voided class action bans in adhesion contracts. AT&TM also does not mention that courts in California and elsewhere have invoked this supposedly "arbitration-specific" analysis to nullify class action bans in contracts that do not contain arbitration clauses. And finally, although AT&TM asserts that California law establishes a "near-categorical ban on arbitration agreements that do not allow for class-wide dispute resolution," (AT&TM's Brief at 15), AT&TM does not mention that many courts in California alone have upheld class action bans in adhesion contracts when they do not exonerate the drafter from liability.

Instead, AT&TM faults California courts for "deviating" from AT&TM's own narrow, watered down, idiosyncratic version of the unconscionability doctrine. First, AT&TM claims that courts cannot deem a term to be substantively unconscionable unless it "shocks the conscience," or is so unfair that the non-drafting party must have been under a "delusion." But AT&TM supports this position by citing late nineteenth and early twentieth century cases that applied the doctrine of intrinsic fraud: a hoary ancestor to the modern unconscionability defense that has little contemporary relevance.

Second, AT&TM cites bounties that it supposedly provides for plaintiffs to arbitrate small-value claims on an individual basis as evidence that no reasonable court could deem its class action ban to be unfair. But these alleged rewards do not cure the inequity of AT&TM's class action ban. As the Washington Supreme Court reasoned while voiding a supposedly incentive-laden class action ban written by AT&TM's predecessor company, these asserted bonuses do not "make it worth the time, energy, and stress to pursue such individually small claims." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1007 (Wash. 2007). Thus, AT&TM retains its freedom from "potential liability for small claims, no matter how widespread." *Id.* at 1008. And in turn, as the district court in this case recognized, AT&TM's ability to flout the law fundamentally reshapes its relationship with consumers. *See Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2008 WL 5216255, at *14 (S.D. Cal., Aug. 11, 2008) ("[t]his overarching policy concern of deterring corporate wrongdoing is not sufficiently addressed by AT&TM's revised arbitration provision").

Third, AT&TM faults *Discover Bank* for supposedly injecting ex post considerations into the unconscionability inquiry. AT&TM argues that *Discover Bank* does so by conditioning a finding of unconscionability on plaintiffs both proving that small amounts of damages are at issue and alleging that the defendant misled or otherwise cheated customers. But these criteria are additional *hurdles* for plaintiffs; indeed, if plaintiffs cannot meet them, courts *enforce* class action bans. AT&TM thus criticizes *Discover Bank* for actually increasing the odds that courts will *uphold* arbitration clauses.

ARGUMENT

I. The Policies Behind the Unconscionability Doctrine Apply With Full Force to Class Action Bans

"[C]onsent . . . is essential to the existence of a contract." CAL. CIV. CODE § 1550. To be sure, courts decide whether a party has consented objectively, based on "the reasonable meaning of their words and acts." *Bustamante v. Intuit, Inc.*, 45 Cal. Rptr. 3d 692, 699 (Ct. App. 2006). However, in the context of adhesion contracts such as ATTM's, this rule is subject to an important qualification. A drafter "does not ordinarily expect his customers to understand or even read the standard terms." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979). Thus, as Karl Llewellyn, the architect of the Uniform Commercial Code, famously observed, a drafter cannot reasonably view a customer's *apparent* consent to one-sided terms in an adhesion contract as *actual* consent:

> Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few [negotiated] terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form.

KARL N. LLEWELLYN, THE COMMON LAW TRADITION 362 (1960).[2]

The unconscionability doctrine is one tool that courts use to nullify non-consensual terms in adhesion contracts. As the D.C. Circuit explained in the watershed case of *Williams*, 350 F.2d 445, the two-pronged test for unconscionability, with its procedural and substantive elements, pinpoints non-consensual terms:

> [W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, *it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms*.

Id. at 449-50 (emphasis added); *accord A & M Produce*, 186 Cal. Rptr. at 122 (linking the unconscionability doctrine to the fact that "contract terms not actively negotiated between the parties fall outside the 'circle of assent'"); *cf. Ilkhchooyi v. Best*, 45 Cal. Rptr. 2d 766, 775 (Ct. App. 1995) ("The burden should be on the party submitting [an adhesion contract] to show that the other party had knowledge of any unusual or

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[2] *Accord* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (in the context of adhesion contracts, if a "party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement"); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 638 (2002) ("if most reasonable persons would not have agreed to such a term, then the other party cannot assume consent to be bound to such a term unless it is made visible").

unconscionable terms contained therein" (quotation marks omitted)).[5]

In addition, courts regulate adhesion contracts by striking down "clauses of limitation of liability which are unclear, unexpected, inconspicuous or unconscionable." *Steven v. Fidelity & Cas. Co.*, 58 Cal.2d 862, 879 (1962). In California, this principle emanates from Civil Code section 1668, which prohibits "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, . . . or violation of law, whether willful or negligent."

Two policies underlie rigorous judicial review of adhesive terms that reduce the drafter's accountability. First, these terms, often projected across thousands or even millions of contractual relationships, allow drafters to ignore their obligations under the substantive law. *See Hiroshima v. Bank of Italy*, 248 P. 947, 953 (Cal. 1928) (voiding damages limitation in contract imposed by bank because the "public . . . is interested in seeing that the bank is held

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[5] *See also* RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d ("gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm . . . that the weaker party . . . did not in fact assent or appear to assent to the unfair terms"); *id.* at § 211 cmt. a (because customers only "assent[] to a few terms," standard forms are subject to "the power of the court to refuse to enforce an unconscionable contract or term"). Indeed, members of this Court have recognized that "a determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O'Connor, J., joined by Thomas, J., concurring in part and dissenting in part).

accountable for the ordinary and regular performance of its duties"). More fundamentally, the fact that these clauses are "unjust and unreasonable" underscores that they are "wanting in the element of voluntary assent." *The Kensington*, 183 U.S. 263, 268 (1902) (voiding liability waiver in steamship ticket).

For instance, in *Tunkl v. Regents of University of Cal.*, 383 P.2d 441 (Cal. 1963), the California Supreme Court nullified a hospital's release of negligence liability. The state high court explained that section 1668 forbade damages waivers—even for bare negligence—in contracts that "involved the public interest." *Id.* at 444. The hallmarks of such a contract, the court reasoned, included the drafter's (1) status as a business "of a type generally thought suitable for public regulation," (2) performance of a service "which is often a matter of practical necessity for some members of the public," (3) "willing[ness] to perform this service for any member of the public who seeks it," and (4) use of a "standardized adhesion contract of exculpation." *Id.* at 445-46. According to the court, when these factors are present, "the releasing party *does not really acquiesce voluntarily in the contractual shifting of the risk*." *Id.* at 446 (emphasis added).[5]

In *Discover Bank*, 113 P.3d 1100, the California Supreme Court drew on California's well-established

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[5] On the other hand, where more than bare negligence is involved—"where the contract purports to avoid liability for fraud, willful injury, or violation of law, whether intentional or negligent"—then "[t]he plain language of section 1668 renders exculpatory provisions invalid." *Capri v. L.A. Fitness Intern., LLC*, 39 Cal. Rptr. 3d 425, 429 (Ct. App. 2006).

unconscionability doctrine and section 1668 to establish parameters for the validity of class action bans. In that case, a company had unilaterally grafted a class action ban into a consumer contract through a non-descript "bill stuffer." *Id.* at 1108. The court cited that fact as evidence that "an element of procedural unconscionability is present." *Id.* The court then reasoned that because class action bans in small-dollar consumer cases "operate to insulate a party from liability," they can be found substantively unconscionable in certain circumstances:

> when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'

Id. at 1110 (quoting CAL. CIV. CODE § 1668).

ATTM casts *Discover Bank* as a California-specific rule that amounts to a "near-categorical ban on arbitration agreements that do not allow for class-wide dispute resolution." ATTM's Brief at 15; Brief of DRI – The Voice of the Defense Bar as *Amicus Curiae* in Support of Petitioner ("DRI's Brief") at 21 (criticizing "California's novel and elusive approach"); Brief *Amici Curiae* of Distinguished Law Professors in Support of Petitioner ("Professors' Brief") at 3

("California courts have . . . erect[ed] an insurmountable barrier to bilateral arbitration in all consumer contracts"). These claims are mistaken.

For one, *Discover Bank*'s recognition that class action bans can be unconscionable is not just "California's" approach—it is the runaway *leading* approach. Courts applying the law of at least twenty states have also determined that class action bans are unconscionable when they "insulate [the drafter] from liability," *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006) "act effectively as an exculpatory clause," *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 99 (N.J. 2006), and thus license "a broad range of wrongful conduct." *Scott*, 161 P.3d at 1009.[5]

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[5] *See also Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1279-80 (D. Ariz. 2007); *Powertel v. Bexley*, 743 So. 2d 570, 576 (Fla. Ct. App. 1999); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (applying Georgia law); *Lazado v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000); *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009); *Brewer v. Missouri Title Loans, Inc.*, No. SC90647., -- S.W.3d --, 2010 WL 3430411, at *4-*5 (Mo., Aug. 31, 2010); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 746 (Wis. App. 2007); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308, 310 (Mo. App. 2005); *Herron v. Century BMW*, 693 S.E.2d 394, 399 (S.C. 2010); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

Moreover, despite ATTM's claim that these decisions evidence "discrimination" against arbitration, courts in California and elsewhere have employed the same reasoning and found class action bans to be unfair both when they are embedded in arbitration clauses and when they are not. *See, e.g., America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712 (Ct. App. 2001) (striking down forum-selection clause that thwarted "the right to seek class action relief in consumer cases[, which] has been extolled by California courts"); *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024 (Wash. 2007) (refusing to enforce forum selection clause that would eliminate the ability to bring a class action); *America Online, Inc. v. Pasieka*, 870 So.2d 170, 172 (Fla. Ct. App. 2004) (same).

Finally, although ATTM views these decisions as posing an "insurmountable barrier" to bilateral arbitration, numerous courts in California alone have upheld class action waivers under *Discover Bank*. *See, e.g., Arguelles-Romero v. Superior Court*, 109 Cal. Rptr. 3d 289, 305 (Ct. App. 2010) (enforcing class arbitration waiver in financing contract where "plaintiffs failed to establish that the individual amounts at issue are so small that a class action is the only viable remedy"); *Walnut Producers of California v. Diamond Foods, Inc.*, 114 Cal. Rptr. 3d 449, 461 (Ct. App. 2010) ("plaintiff's complaint does not establish that the Agreement's class action waiver acted as an exculpatory clause or unduly hindered plaintiffs from pursuing a legal remedy").[6]

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[6] *See also Gold v. Melt, Inc.*, No. B210452, 2010 WL 1509795, at *8 (continued...)

Accordingly, courts in California and other states invoke the unconscionability doctrine to preserve the role of mutual assent in contract law and to prevent drafters from using fine print to effectively rewrite or evade their duties and responsibilities. For precisely these reasons, courts find class action bans to be unconscionable—whether within a contract mandating arbitration or not.

II. ATTM Fails to Demonstrate that Courts Voiding Class Action Bans Deviate From Traditional Unconscionability Principles

Nevertheless, ATTM contends that cases invalidating class action bans under the unconscionability doctrine "bear[ ] no resemblance whatever to the traditional unconscionability

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[9](...continued)
(Cal. Ct. App., Apr. 16, 2010) ("The elements of unconscionability not being present, we conclude that the class action waivers in the Melt franchise agreements are enforceable."), *Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1029 (E.D. Cal. 2009) ("plaintiffs ha[ve] not shown that a 'small' amount of damages was at issue for each plaintiff"), *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1202 (C.D. Cal. 2006) ("Mr. Provencher's claims do not involve a small amount of money"); *Smith v. Americredit Fin. Servs., Inc.*, No. 09cv1076, 2009 WL 4895280, at *7 (S.D. Cal., Dec. 11, 2009) ("the Court finds this case does not satisfy the second prong of *Discover Bank*"), *McCabe v. Dell, Inc.*, No. CV 06-7811, 2007 WL 1434972, at *4 (C.D. Cal., Apr. 12, 2007) ("Defendant has not immunized itself from liability"); *Torres v. Chrysler Fin. Co.*, No. C 07-00915, 2007 WL 3165665, at *3 (N.D. Cal., Oct. 25, 2007) ("Plaintiff has failed to allege that Defendants have 'deliberately cheat[ed] large numbers of consumers out of individually small sums of money' as required by *Discover Bank*" (quoting *Discover Bank*, 113 P.3d at 1110)).

principles that apply to contracts generally." ATTM's Brief at 18. ATTM is wrong.

A. ATTM Relies on an Obsolete Definition of Substantive Unconscionability

ATTM cites *Hume v. United States*, 132 U.S. 406 (1889) and *Eyre v. Potter*, 15 How. (56 U.S.) 42 (1853) for the proposition that "California equates unconscionability with terms that shock the conscience and to which no person who is not acting under delusion would agree." ATTM's Brief at 3-4, 18, 32-33; DRI Brief at 5-6; Law Professor Brief at 19-20. However, these cases deal with intrinsic fraud: an entirely different—and completely outdated—strand of the unconscionability doctrine.

The intrinsic fraud rule allowed judges to void deals between parties with *equal* bargaining power based on nothing more than gross inadequacy of consideration. For instance, in *Hume*, the party invoking the rule was none other than the federal government. 132 U.S. at 414. The Court held that the contract, which called for the government to buy items at "35 times their highest market value" was "fraudulent" because it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Id.* Similarly, in *Eyre*, a widow allegedly sold tens of thousands of dollars in inheritance rights for a mere $1,000, and the Court opined that "unconscionableness" may vitiate a contract if it "shock[s] the conscience[ ] and amount[s] in itself to conclusive and decisive evidence of fraud." *Eyre*, 56 U.S. at 60. Of course, nullifying a deal based on nothing more than a disparity of the values exchanged cuts hard against the grain of contract law.

Thus, it is no surprise that courts insisted on such forceful proof.

However, the intrinsic fraud rule has never been the sum total of the unconscionability doctrine. Courts sitting in equity routinely declined to specifically enforce contracts that were "unconscionable or inequitable." *Milton Kauffman, Inc., v. Smith*, 82 Cal.App.2d 302, 304-05 (1947). Unlike the intrinsic fraud rule, this equity-based unconscionability doctrine did not require proof that a bargain would "shock the conscience of the chancellor." *Haddock v. Knapp*, 171 Cal. 59, 61-62 (1915) (rejecting that very argument and refusing to specifically enforce deal to sell $2,500 of property for $1,800); *Wilson v. White*, 161 Cal. 455, 465 (1911) (refusing to specifically enforce agreement to sell for $14,000 a tract of land worth $15,000).

The modern version of unconscionability—the one that governs adhesion contracts—is a hybrid of the intrinsic fraud and equitable unconscionability rules. For instance, in *Williams*, 350 F.2d at 449, the D.C. Circuit defined substantive unconscionability as "terms which are unreasonably favorable to the other party." The court quoted *Hume*'s language about "delusion[s]" as representative of the distinct "common law doctrine of intrinsic fraud." *Id.* at 499 n.7. Most jurisdictions have now endorsed some version of *Williams*' definition of substantive unconscionability. For instance, the New Mexico Supreme Court recently "specifically disapproved" of the "delusion" test from *Hume*:

> Our law has never really required that a person seeking relief from an unconscionable contract

> must first establish that he or she actually had to have been a madman or a fool to sign it. The repetition of this unhelpful terminology from a bygone age only serves to confuse the unconscionability issues without serving any constructive purpose.

Cordova v. World Finance Corp., 208 P.3d 901, 909-10 (N.M. 2009).[7]

California also follows the modern view of substantive unconscionability. The legislative purposes section of California's unconscionability statute refers only to "one-sided" terms and says nothing about "delusions" or "shocked consciences." CAL. CIV. CODE § 1670.5. Moreover, the leading California appellate case, *A&M Produce*, 186 Cal. Rptr. at 122 merely declares that "a contractual term is substantively suspect if it reallocates the risks of the bargain in a objectively unreasonable or unexpected manner." In *Perdue*, 38 Cal. 3d at 925 n.9, the California Supreme Court expressly endorsed *A&M Produce*'s approach and stated that substantive unconscionability "involve[s] consideration of whether

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[7] For a non-comprehensive list of courts in other states that have also eschewed the "delusion" and "shock the conscience" tests, *see Fotomat Corp. v. Chanda*, 464 So.2d 626, 629 (Fla. Ct. App. 1985); *Branco v. Norwest Bank Minnesota, N.A.*, 381 F. Supp. 2d 1274, 1281 (D. Hawaii 2005); *Razor v. Hyundai Motor America*, 854 N.E.2d 607, 622 (Ill.2006); *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1376 (Mass. 1980); *Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 799 (Neb. 2006); *Shell Oil Co. v. Marinello*, 307 A.2d 598 (N.J. 1973); *Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993); *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 678 (Tex. 2006); *Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 587 (Wis. Ct. App. 1992).

the provision [i]s one-sided, unreasonable, and lack[s] justification." Neither case involved arbitration, and neither case adopted ATTM's "delusion" or "shock the conscience" tests.[8]

Indeed, the "delusion" or "shock the conscience" tests are out of step with modern unconscionability. The intrinsic fraud rule was a kind of super-substantive unconscionability: it applied even when there was no inequality of bargaining power or fine print. Yet the modern unconscionability doctrine imposes the additional requirement that a contract be procedurally unconscionable. Insisting that a procedurally unconscionable term *also* be "delusive" or "conscience shocking" would thus make it more difficult to challenge the validity of an adhesion contract than a bargained-for deal between equals: a result that cannot be correct. Thus, it is ATTM's

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[8] For California authority, ATTM and its *amici* rely on (1) decades-old cases that involve the intrinsic fraud rule, *see* ATTM Brief at 3-4 (citing *Herbert v. Lankershim*, 9 Cal.2d 409 (1937) and *Odell v. Moss*, 130 Cal. 352 (1900)) and (2) a handful of recent cases from the First and Fourth Appellate Districts that have disagreed with *A&M Produce*'s definition of substantive unconscionability. *See* ATTM Brief at 3-4, 34 n.10, 38; Professor Brief at 19-21 (citing, for example, *American Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477 (Ct. App. 1996), *California Grocers Assn. v. Bank of America*, 27 Cal. Rptr. 2d 396 (Ct. App. 1994), and *Morris v. Redwood Empire Bancorp*, 27 Cal.Rptr.3d 797 (Ct. App. 2005)). ATTM and its *amici* fail to explain, however, how the California Supreme Court "discriminates" against arbitration by failing to adopt a minority view among inferior appellate courts and instead following its own, non-arbitration-related precedent.

definition of substantive unconscionability– not the California Supreme Court's–that "distorts" the law.[9]

B. AT&T M's Class Action Ban Is Unconscionable Because It Reduces AT&T M's Potential Liability and Thus AT&T M's Incentives to Conform to the Law

AT&T M next argues that because it offers bounties for plaintiffs to arbitrate small-value claims on an individual basis, no court faithfully applying the common law of contracts could find that its class action ban is unfair. AT&T M contends that the district court

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[9] AT&T M's *amici* DRI purports to quote the RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. b as follows:

> "Traditionally"—and to this day—"a bargain was said to be unconscionable" only "'if it was such as no man in his sense and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.'"

DRI's Brief at 5. In full, however, the passage from section 208 reads:

> *b. Historic standards.* Traditionally, a bargain was said to be unconscionable *in an action at law* if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'

By omitting the phrases "[h]istoric standards" and "action at law" and adding the words "to this day," DRI removes any reference to the doctrine of equitable unconscionability and thereby creates the false impression that the "delusion" test remains as influential as it was a century ago.

and Ninth Circuit "effectively" found that its class action ban is "fair to the Concepcions." AT&TM's Brief at 35. According to AT&TM, these courts thus voided its class action ban out of "concern for the rights of third persons other than the parties to the agreement before the court." *Id.* at 36. AT&TM then asserts that this approach "finds no support" within contract law and is therefore "plainly discriminatory" against arbitration. *Id.*

AT&TM is wrong on all counts. First, AT&TM's purported rewards for pursuing claims individually do not make its class action ban "fair to the Concepcions"—and the courts below found no such thing. AT&TM places tremendous emphasis on the district court's statement that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation." AT&TM's Brief at 11, 18, 33, 34-36 (quoting *Laster*, 2008 WL 5216255, at *12). But this language does not mean that the district court found that AT&TM's class action ban is fair for purposes of the unconscionability doctrine. The relevant question is not whether consumers would rather arbitrate individually or as a class *once a dispute arises*.[10] Instead, the issue hinges on whether, *at the time of contracting*, it is unfair to impose upon consumers a class action ban that supposedly creates incentives to pursue claims individually but also saddles each consumer with the sole responsibility for uncovering and challenging future wrongdoing.

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[10] Indeed, that would be exactly the kind of ex post perspective that AT&TM condemns. *See infra* Part II(C).

The district court and Ninth Circuit below correctly held that the class action ban was unfair. These courts began by noting a fact that ATTM cannot and does not dispute: because few consumers will learn that their rights have been violated, and fewer still will seek redress, the class action ban "greatly reduc[es]" its "aggregate liability." *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 (9th Cir. 2009); *Laster*, 2008 WL 5216255, at *13 (reasoning that the class action ban allows ATTM to "avoid potential liability to thousands of other customers who have no knowledge of the alleged wrongdoing").

Courts in several states have also determined that ATTM's class action ban acts as a bulwark against liability. For instance, in *Coneff v. AT&T*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009), a district court applying Washington law concluded that a "miniscule" number—fewer than two hundred of ATTM's seventy million customers—had invoked its supposedly pro-consumer features, suggesting that they "are either unaware of their right[s]" or truly "have no incentive to bring their claims." *Id.* at 1258-59; *accord Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592, 595, 603-04 (D.N.J. 2009) (reasoning that ATTM's class action ban "allows ATTM to escape liability . . . because while it may settle with several individuals for $175, the truth of the matter is that a large percentage of consumers will not file suit"); *Scott*, 161 P.3d at 1007 (voiding a supposedly incentive-laden class action ban drafted by ATTM's predecessor company because without the class action device, "many consumers may not even realize that they have a claim"); *Stiener v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016, 1029 (N.D. Cal.

2008) (holding that AT&T's "incentives" are "illusory").[11]

In turn, this "'get out of jail free' card," *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002), all but abolishes AT&T's incentives to conform to the law. As the district court below explained, the class action ban "serve[s] as a disincentive for [AT&T] to avoid the type of conduct that might lead to class action litigation in the first place." *Laster*, 2008 WL 5216255, at *13-*14 (quoting *Discover Bank*, 113 P.3d at 1108). Under well-established California precedent, a term can be substantively unconscionable for precisely that reason. For instance, in *A&M Produce*, 186 Cal. Rptr. 114, the court of appeals nullified a disclaimer of warranties and consequential damages in a contract between two businesses. The court reasoned that by reducing its damages exposure, the drafter "was in essence guarantying nothing about what the product would do," and that it would be "patently unreasonable to assume that a buyer would purchase a standardized mass-produced product from an industry seller without any enforceable performance standards." *Id.* at 125.

As in *A&M Produce*, AT&T's class action ban undermines its core obligations to consumers. Without the specter of class action liability, AT&T can flout its contractual promises and other legal duties. This is true no matter what incentives AT&T creates to

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[11] It bears emphasis that the question before this Court is not whether these holdings are correct, but whether they deviate so flagrantly from traditional contract law that they evidence "discrimination" against arbitration.

pursue individual claims in arbitration. These bells and whistles do not cure the fact that AT&T M's class action ban requires each individual consumer to bear the costs of (1) monitoring every aspect of AT&T M's conduct, (2) acquiring information about the lawfulness of this conduct, and (3) affirmatively seeking relief for any malfeasance. This is a significant reallocation of risk. Indeed, consumers already "must spread their attention 'thinly across thousands of transactions and the management of hundreds of possessions.'" Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1661 (2006) (quoting E. Scott Maynes, *Consumer Problems in Market Economies*, in ENCYCLOPEDIA OF THE CONSUMER MOVEMENT 158, 163 (1997)).[12] Thus, because it is unfair to require consumers to police AT&T M's conduct themselves, AT&T M's class action ban is unconscionable.

But even if AT&T M were correct that its class action ban was "fair to the Concepcions," it is wrong that courts must ignore "the impact of the challenged provision upon third parties." AT&T M's Brief at 36-37. *Lynwood Redevelopment Agency v. Angeles Field Partners, LLC*, 2009 WL 4690213, at *8 (Cal. Ct. App.

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[12] As this case illustrates, there is also a real risk that consumers will neither notice nor understand AT&T M's claimed incentives. AT&T M unilaterally added these terms—which are so complex that AT&T M requires three pages of briefing just to summarize them, see AT&T M's Brief at 5-7—to all of its existing contracts by mailing "bill stuffers" to its customers. *See Laster*, 2008 WL 5216255, at *6-*7; David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 655 (2010) (noting that AT&T M's clause "is likely unintelligible to most consumers").

Dec. 10, 2009), the unpublished, non-precedential decision on which AT&TM relies, reversed a trial court decision that had accepted the far-fetched argument that it would be unconscionable to voters to enforce a contract to which they were not parties: one between their city council and developers. Conversely, here the district court's fairness concerns—that AT&TM had "granted itself a license to push the boundaries of good business practices to their furthest limits," *Laster*, 2008 WL 5216255, at *14 (quoting *Discover Bank*, 113 P.3d at 1108)—center on the very consumers who are subject to the class action ban. AT&TM cites no authority for the proposition that a court cannot weigh the effect of its class action ban on other *contract signatories*.[13]

And in any event, courts applying California Civil Code section 1668 and *Tunkl*, 383 P.2d 441 strike down limitations on liability to protect other signatories who are not before the court and even

[13] Courts can employ the unconscionability doctrine to "avoid any unconscionable result." CAL. CIV. CODE § 1670.5(b). Historically, this sweeping standard did, in fact, allow courts to consider effects of the contract on non-parties. For instance, in the intrinsic fraud cases on which AT&TM relies for its definition of substantive unconscionability, courts often invalidated unwise deals entered into by prospective heirs to convey money they would soon inherit from their parents. Courts did so not to protect the heirs (who were parties to the contract), but the parents (who were not). *See, e.g.*, *McClure v. Raben*, 25 N.E. 179, 181 (Ind. 1890) (noting that courts voided these contracts "because they unconscientiously compromise . . . the private rights, interests, duties, or intentions of third persons" (quoting STORY'S COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 328)).

strangers to the contract.[14] Section 1668, which was enacted in 1872, forbids "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury . . . or violation of law, whether willful or negligent." Thus, in *Hiroshima*, 248 P. 947, the California Supreme Court voided a liability release in a banking form because "'the banking public, as well as the particular individual [in the case] . . . is interested in seeing that the bank is held accountable for the ordinary and regular performance of its duties.'" *Id.* at 953; *see also Fairfax Gas & Supply Co. v. Hadary*, 151 F.2d 939, 941 (4th Cir. 1945) (noting that in situations where "one person is dealing contemporaneously with several others . . . a clause limiting his liability to one of them is considered to have a tendency to lead to conduct injurious to others" (quoting 6 WILLISTON ON CONTRACTS § 1715(c)).[15]

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[14] Courts and commentators have noted that *Tunkl*'s rule against exculpatory clauses and the unconscionability doctrine are often interchangeable. *See, e.g., Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) ("*Tunkl*'s approach is essentially rooted in the unconscionability doctrine"); Daniel I. Reith, *Contractual Exculpation From Tort Liability in California--The "True Rule" Steps Forward*, 52 CAL. L. REV. 350 (1964) (noting that unconscionability "is aimed at preventing overreaching in the same adhesion contract situations dealt with in *Tunkl*"); RESTATEMENT (SECOND) CONTRACTS § 195 ("a party's attempt to exempt himself from liability for negligent conduct may fail as unconscionable").

[15] For this reason, ATTM is simply wrong when it asserts that section 1668 does not permit courts to consider "potential impacts on nonparties, as opposed to solely the party before the court." ATTM's Brief at 43-44.

AT&TM argues that section 1668 does not apply because its class action ban "does not immunize [it] from *all* liability" and thus "is not 'exculpatory' in any ordinary sense of the term." AT&TM's Brief at 47, 42 (emphasis added). But that is not the standard for determining whether section 1668 applies. Section 1668 vitiates "[a]ll contracts which . . . indirectly . . . exempt anyone from [legal] responsibility." As a matter of settled California law, a contract can violate section 1668 even if it is merely "a limitation on liability and . . . not a complete exemption." *Health Net of Cal., Inc. v. Dep't of Health Services*, 6 Cal. Rptr. 3d 235, 247 (Ct. App. 2003). For instance, in *Klein v. Asgrow Seed Co.*, 54 Cal. Rptr. 609, 617 (Ct. App. 1966), a clause in a seed manufacturer's agreement limited damages to the price of the seed, but did not exclude damages completely. The court held that "section 1668 makes the statement of limitation-of-liability void." *Id.* at 609.

In sum, because AT&TM's class action ban delegates the task of preventing corporate wrongdoing to each individual consumer, it is unfair to impose that clause on consumers through an adhesion contract—even if AT&TM is likely to make whole any consumers intrepid enough to sue. And even if AT&TM were correct that the class action ban is fair to consumers who invoke its provisions, it is not fair to absent consumers who will never learn about or receive compensation for AT&TM's malfeasance.[16]

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[16] AT&TM's *amici* law professors also fault California courts for factoring the issue of "mutuality" into their unconscionability calculus. *See* Professors' Brief at 24-28. Yet even according to their own description, a lack of mutuality occurs when a contract

(continued...)

C. AT&TM Fails to Show that *Discover Bank* Improperly Adopts an Ex Post Perspective

AT&TM also argues that *Discover Bank* improperly adopts an ex post perspective because it instructs courts to consider whether a plaintiff "allege[s] that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." AT&TM's Brief at 38 (quoting *Discover Bank*, 113 P.3d at 1110); DRI's Brief at 14 ("the clearest evidence of the court's ex post approach is its reliance on the customer's underlying allegations").

But AT&TM misunderstands this aspect of the analysis. Rather than *expanding* the situations in which courts can deem class action bans to be unconscionable, it *limits* them. The first two *Discover Bank* variables stand for the proposition that class action bans in adhesion contracts are unconscionable at the time of contracting:

> when [1] the waiver is found in a consumer contract of adhesion [2] in a setting in which disputes between the contracting parties predictably involve small amounts of damages . . . .

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[16](...continued)
term is "one-sided." *Id.* at 25. As the California Supreme Court has declared outside of the arbitration context, a term can be substantively unconscionable precisely because it is "one-sided." *Perdue*, 38 Cal. 3d at 925.

Discover Bank, 113 P.3d at 1110. If this were the entire standard, few class action bans in consumer contracts would pass muster.

But the third factor—the one that ATTM attacks—recognizes *an exception* to what would otherwise be a bright-line rule: it requires plaintiffs to prove that they truly do seek "small sums of money." *Id.* Indeed, if the circumstances reveal that plaintiffs actually intend to pursue large damage awards, they do not meet this criterion. *See, e.g., Dalie*, 636 F. Supp. 2d at 1029 (enforcing class action ban for failure to show "that a 'small' amount of damages was at issue"); *Provencher*, 409 F. Supp. 2d at 1202 (same). Likewise, by conditioning unconscionability on specific allegations of misconduct, the third factor excludes plaintiffs with garden-variety tort and contract cause of action.[17]

Thus, the part of *Discover Bank* that ATTM challenges *exempts* contracts from invalidity and *narrows* the scope of the unconscionability doctrine. To the extent that there is any correlation between class action bans and arbitration clauses, this factor hardly "discriminates" against arbitration. To the contrary, it makes it more likely that courts will *enforce* arbitration clauses.

ATTM's *amici* DRI argues that the third prong of *Discover Bank* somehow prevents courts from

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[17] Not all states recognize this limitation. *See, e.g., Jones v. DirecTV, Inc.*, 667 F. Supp. 2d 1379, 1381 (N.D. Ga. 2009) (voiding class action ban when plaintiff merely alleged that the defendant breached a contract, not misled customers).

considering that "customer[s] benefit[ ] from . . . lower prices" in exchange for AT&TM's class action ban. DRI's Brief at 11-12. But the proper target of DRI's ire is not *Discover Bank*, but rather the unconscionability doctrine itself. If courts presumed that (1) harsh terms lead to lower prices and that (2) buyers prefer lower prices to fair terms, then courts would *always* enforce harsh terms. That is not the law.[18] The unconscionability doctrine is firmly on the books. This case is not a referendum on it.

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[18] In any event, the proposition that drafters pass savings from harsh terms back to customers has been widely questioned. *See, e.g.*, R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 664 (1996) (noting that this theory "does not accurately describe what usually occurs in the market"); *Ting v. AT&T*, 182 F. Supp. 2d 902, 931 (N.D.Cal. 2002), *aff'd in part and rev'd in part by Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) ("while lower costs can produce lower charges, they can also produce higher profits"). Moreover, the article on which DRI heavily relies, *see* DRI's Brief at 16-17, concludes that courts should invoke the unconscionability doctrine to nullify harsh terms *even if those terms result in lower prices to consumers*. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1293-94 (2003) ("enforcement of all [adhesion contract] terms will not create socially optimal contracts").

CONCLUSION

For these reasons, the Court should affirm the Ninth Circuit's decision.

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APPENDIX

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

CTIA—The Wireless Association® ("CTIA") is a non-profit organization representing diverse sectors of the wireless communications industry. CTIA's membership encompasses hundreds of service providers, manufacturers, wireless data and Internet companies, as well as other contributors to wireless services. CTIA has made appearances in regulatory proceedings before the Executive Branch, the Federal Communications Commission, Congress, and various state legislative bodies on behalf of the wireless communications industry. CTIA also engages in outreach to the government and the public to build awareness on matters of significance to the wireless communications industry.

Many CTIA members use nationwide customer service agreements providing that customer disputes be resolved through arbitration rather than litigation and specifying that arbitration

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

proceed on an individual, not class-wide, basis. The latter individual-claim-only provisions are among the most valuable provisions in the agreements to both CTIA members and their customers, ensuring a streamlined and efficient process for resolving disputes.

CTIA has a strong interest in cases raising important issues of arbitration, and has participated as *amicus curiae* in several recent cases. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Preston v. Ferrer*, 552 U.S. 346 (2008). *Amicus* and its members seek to ensure that individual arbitration remains a viable, efficient, and cost-effective means of dispute resolution that, in turn, contributes to customer satisfaction and loyalty. If courts may void an arbitration agreement whenever class-action procedures are foreclosed by the parties' consent, many wireless carriers will question the wisdom of pursuing arbitration at all in the future.

INTRODUCTION AND SUMMARY OF ARGUMENT

Conditioning arbitration agreements on the availability of class-wide treatment amounts to a direct attack on arbitration. Most of the 240 million mobile telephone subscribers in the United States have service agreements that expressly provide for arbitration and specify that the arbitration must proceed on an individual basis. For hundreds of wireless carriers, like AT&T Mobility, and their millions of customers, that consent to individual arbitration forms one of the

most important provisions of their agreements. By providing that disputes should be resolved through arbitration rather than litigation, and brought on an individualized basis, carriers are able to lower their costs, streamline their dispute resolution process, and maintain amicable and productive relationships with their customers. Customers, in turn, reap the rewards of lower service costs and expeditious results.

The Ninth Circuit's decision renders millions of such critical provisions unenforceable. By conditioning the enforcement of arbitration agreements on the availability of class-wide arbitration, the Ninth Circuit effectively rewrote AT&T Mobility's arbitration agreement in direct contravention of its terms. But allowing a state policy interfering with the parties' mutual consent and favoring one form of arbitration over another is "fundamentally at war with the foundational ... principle that arbitration is a matter of consent." *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp*, 130 S. Ct. 1758, 1775 (2010). It defies the Federal Arbitration Act's ("FAA") chief purpose of ensuring that "private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). And it flouts this Court's consistent warnings that courts' ultimate responsibility is to "give effect to the contractual rights and expectations of the parties." *Id.*

Beyond that, the Ninth Circuit's holding amounts in practical terms to a bar on arbitration. Arbitration in its traditional form is attractive to consumers and businesses alike precisely because

of its promise of "simplicity, informality, and expedition." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Those benefits are eviscerated by the importation of class-action procedures into the arbitral forum. The hybrid form of class arbitration turns the litigation-for-arbitration trade-off on its head, offering instead the worst of both worlds — litigation's complexity, formality, and delay, and arbitration's lack of procedural protections. The problem, accordingly, is not only that the Ninth Circuit engrafted a condition on the arbitration agreement that the agreement explicitly foreclosed; but also that, in so holding, the Ninth Circuit sapped arbitration of its appeal. The Ninth Circuit's decision, if left to stand, will compel carriers to abandon arbitration altogether.

Finally, not only have millions of carefully drafted arbitration agreements been rendered unenforceable in the State of California, but the enforceability of carriers' nationwide agreements for nationwide service will now vary from State to State. And customers nationwide ultimately will bear the increased costs of California's forced substitution of unwieldy litigation for relatively streamlined and efficient arbitration. The enforceability of the plain terms of an arbitration agreement is not meant to turn on the happenstance of where the customer brings suit and what particular State's policy on class actions is at issue. By threatening wireless carriers with precisely that prospect, however, the Ninth Circuit's decision further undermines the FAA's federal policy favoring arbitration.

ARGUMENT

I. THE DECISION BELOW CONSTRUES ARBITRATION AGREEMENTS IN DIRECT CONTRAVENTION OF THEIR TERMS AND THE FEDERAL POLICY FAVORING ARBITRATION.

The FAA evinces a federal policy favoring both arbitration in general and enforcement of the terms produced by the parties' mutual consent in particular. The FAA thus commands federal courts to enforce arbitration agreements according to their terms. Section 2 of the FAA provides that arbitration agreements "*shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Where the agreements clearly specify that arbitration shall take place on an individual basis, then, courts do not have license to trump those terms by invoking a state-law policy disfavoring agreements to proceed individually, rather than via class actions.

This Court has repeatedly directed courts to give "due regard" to the FAA's "federal policy favoring arbitration." *Volt*, 489 U.S. at 476. The Court has espoused and reinforced that federal policy time and time again. Any "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). Any "judicial policy concern[s]" alone may not be grounds for declining to enforce an arbitration agreement altogether. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009). And

"state legislative attempts to undercut the enforceability of arbitration agreements" should be resisted. *Preston v. Ferrer*, 552 U.S. 346, 357 (2008).

The federal policy favoring arbitration is perhaps most directly undercut when a court not only fails to "rigorously enforce ... agreements according to their terms," but construes the agreements in *direct contradiction* of their terms. *Volt*, 489 U.S. at 479 (internal quotation marks omitted). Mutual consent, after all, is the "foundational ... principle" of both arbitration and the FAA. *Stolt-Nielsen*, 130 S. Ct. at 1775. Rewriting the terms of private arbitration agreements to permit what they unequivocally preclude is a straightforward violation of FAA preemption principles.

Because arbitration is at bottom about mutual consent, it is elementary that parties should be free to structure their arbitration agreements "as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). Parties, accordingly, can limit the issues to be arbitrated. *See Mitsubishi Motors*, 473 U.S. at 628. Parties can specify the rules to govern the arbitration, stipulating to procedures as formal or informal as they desire. *See Volt*, 489 U.S. at 479. Parties can choose who will resolve their disputes. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). And parties can specify "*with whom* they

choose to arbitrate their disputes." *Stolt-Nielsen*, 130 S. Ct. at 1774.[2]

Just last Term, in *Stolt-Nielsen*, the Court held that where an arbitration agreement was silent as to whether the parties intended to submit to class arbitration, compelling them to submit to class arbitration would be "fundamentally at war" with the consensual nature of arbitration. *Id.* at 1775. Rather than a "single dispute" between the parties to a single agreement, class arbitration sweeps in "many disputes between hundreds or perhaps even thousands" of parties. *Id.* at 1776. The Court emphasized that the shift from bilateral arbitration to class-action arbitration constitutes a "fundamental change[]" that is "too great" for consent simply to be presumed. *Id.*

Here, AT&T Mobility's agreement, like many similar agreements of wireless carriers and other businesses, was not merely *silent* on the question of whether class-action procedures were available. Rather, the agreement *expressly foreclosed* class-

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[2] The same is not true with respect to litigants who opt to avail themselves of the court system. Such litigants must to a certain extent take the procedural rules of the court system as they find them, subject to background principles such as waiver. For this reason, California's *Discover Bank* rule cannot be defended as a neutral rule favoring class actions in all dispute resolution. *See Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (setting forth three-pronged unconscionability test for arbitration agreements). Whatever the State's interest in having litigants in its state court system follows its rules, it cannot force arbitrations to follow its preferred rules without running afoul of the FAA.

action procedures and mandated individual-claim-only arbitration. Conditioning enforceability on the availability of class-action procedures specifically precluded by the agreements runs roughshod over the parties' intent and the terms of the agreement. The Ninth Circuit did not merely insist on class-action procedures in the face of a contractual ambiguity; it imposed them despite the express agreement of the parties to the contrary. The Ninth Circuit's holding was therefore even more "fundamentally at war" with the FAA principle that arbitration is a matter of consent. *Id.* at 1775.

The end result was that the Ninth Circuit invalidated the linchpin of AT&T Mobility's agreement. That agreement, like most wireless carriers' nationwide service agreements, provides for arbitration but specifically limits the agreement to arbitrate to individual claims.[3] That limitation

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[3] The arbitration agreements of CTIA members Verizon Wireless, Sprint Nextel, and T-Mobile all similarly limit arbitration to individual claims. *See, e.g.*, Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp ("Except for small claims court cases that qualify, any dispute that results from this agreement or from the Services you receive from us ... will be resolved by one or more neutral arbitrators .... This agreement doesn't allow class arbitrations even if [arbitration] procedures or rules would."); Sprint Nextel Service Agreement, http://shop.sprint.com/en/legal/legal_terms_privacy_popup.shtml ("We each agree to finally settle all disputes [except those brought in small claims court or before a government agency] only by arbitration.... We each agree not to pursue arbitration on a classwide basis. We each agree that any arbitration will be solely between you and us

helps ensure a cost-effective, streamlined, non-adversarial process for handling the typically small-dollar customer disputes on a case-by-case basis — free from the attendant burdens of either litigation or multi-party proceedings.

Here, the Ninth Circuit imposed the complex, costly, mass proceedings of class arbitration on carriers and customers who contracted to avoid those very proceedings. The whole point of arbitration, however, is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition" of arbitration. *Mitsubishi Motors*, 473 U.S. at 628.

(not brought on behalf of or together with another individual's claim).... TO THE EXTENT ALLOWED BY LAW, WE EACH WAIVE ANY RIGHT TO PURSUE DISPUTES ON A CLASSWIDE BASIS; THAT IS, TO EITHER JOIN A CLAIM WITH THE CLAIM OF ANY OTHER PERSON OR ENTITY, OR ASSERT A CLAIM IN A REPRESENTATIVE CAPACITY ON BEHALF OF ANYONE ELSE IN ANY LAWSUIT, ARBITRATION OR OTHER PROCEEDING."); T-Mobile Service Agreement, http://www.t-mobile.com/Templates/Popup.aspx?WT.z_unav=ftr__TC&PAsset=Ftr_Ftr_Terms AndConditions&print=true ("WE EACH AGREE THAT ... ANY AND ALL CLAIMS OR DISPUTES IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT.... WE EACH AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS, WHETHER IN ARBITRATION OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A MEMBER IN A CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION.")

Parties that believe that the trade-off only makes sense if the very different stakes and procedures of class arbitration are foreclosed are entitled to make that judgment and make it stick. The Ninth Circuit's decision upends that trade-off. By holding that state-law policies — here, California's minority view that class-action procedures are non-waivable, even in arbitration — may trump the express intent and wishes of the parties, the decision below runs directly contrary to the whole thrust of the FAA.

Allowing States to rewrite arbitration provisions in this manner effectively allows States to undermine arbitration itself. The Ninth Circuit's decision not only undermines the FAA's federal policy favoring arbitration and respecting the mutual consent of the parties by rendering unenforceable millions of arbitration agreements. It also undercuts the very concept of arbitration — private parties bargaining around the procedural constraints of litigation — by conditioning enforceability on the availability of certain preferred procedures. Whatever the State's ability to insist on its favored procedures in its own forums, it cannot superimpose those favored procedures on arbitrations without running afoul of the FAA.

II. THE DECISION BELOW HAS SERIOUS RAMIFICATIONS FOR THE WIRELESS COMMUNICATIONS INDUSTRY AND ITS CUSTOMERS.

A. Arbitration Provides Valuable Benefits To Wireless Carriers And Their Customers.

Arbitration provisions, as noted above, are an important and prevalent feature in many businesses' consumer agreements, including wireless carriers' nationwide service agreements. The provisions are attractive to carriers and customers alike, producing important benefits for both. Holding unenforceable the specifications of millions of mutually beneficial agreements makes no sense as either a matter of policy or precedent.

In enacting the FAA, Congress recognized the broad appeal of arbitration. Congress "had the needs of consumers, as well as others, in mind." S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). Opting for arbitration, Congress believed, would minimize the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37, § 2(a)(3)(B)(iv), 106 Stat. 185. Avoiding those burdens of litigation would therefore appeal "to big business and little business alike, ... corporate interests [and] ... individuals." S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). This Court has likewise long recognized the virtues of arbitration, including its "simplicity, informality, and expedition." *Mitsubishi Motors*, 473 U.S. at 628; *see also Preston*, 552 U.S. at 357 (arbitration

ensures "streamlined proceedings and expeditious results").

Wireless carriers for their part have embraced arbitration as a vital aspect of their business operations. Arbitration provides wireless carriers — many of whom provide service nationwide — and their customers with a streamlined and time- and cost-efficient mechanism for addressing and resolving disputes out of court. Through arbitration, carriers are able to keep dispute resolution costs to a minimum and, in turn, maintain lower service costs for their customers. At the same time, the non-adversarial process reduces the likelihood that a customer relationship will turn sour; in fact, generous arbitral awards and an efficient arbitration process can shore up customer loyalty to the carrier. Intense competition and low prices among mobile phone carriers have spurred carriers to put an increasing premium on high-quality customer service and high subscriber retention rates over the long-term. *See In re Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 08-28, WT Docket No. 07-71 ¶¶ 225, 290 (Feb. 4, 2008).

Customers of wireless services likewise reap substantial benefits from arbitration provisions. The wireless carriers' cost savings are passed along to customers in the form of lower prices. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-55 (2006). Absent the

arbitration remedy, moreover, consumers with small-dollar damages claims would be forced to seek remedies in court — "the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). The availability of an informal arbitration process means that more customers with grievances are likely to pursue and therefore obtain remedies. And, of course, customers who have their grievances resolved are more likely to remain customers.

The value to customers is especially pronounced where, as here, the arbitration provisions are extraordinarily customer-protective — by one district judge's account, "perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009) (Feess, J.). As the district court below observed, the arbitral awards under AT&T Mobility's provision substantially exceed the average payments granted to class representatives as part of court-approved settlement agreements. The terms were so protective, in fact, that they served to prompt AT&T Mobility to accept liability before arbitration "even for claims of questionable merit and for claims it does not owe" to avoid having to shoulder the costs of arbitration. Pet. App. 39a.

Thus, consistent with the pronouncements of Congress and this Court, both carriers and customers stand to gain from arbitration and its numerous efficiencies and relative advantages to litigation.

B. Class Arbitration Defeats The Benefits Of Traditional Arbitration.

By contrast, class arbitration often devolves into a lose-lose proposition. Class arbitration is a relatively recent innovation; it was not until 2003, in the wake of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), that the main arbitration providers even established rules to govern class arbitrations. *See* David S. Clancy, et al., *An Uninvited Guest: Class Arbitrations and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 56 & n.1 (2007).

As this Court recently recognized in *Stolt-Nielsen*, class arbitration is fundamentally different from traditional arbitration. Indeed, each of class arbitration's departures from the rules of traditional, individual arbitration "disrupt the negotiated risk/benefit allocation" of traditional arbitration and represent an altogether "different sort of arbitration" than the parties bargained for. *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995). The class arbitration hybrid blurs the distinction and trade-off between arbitration's streamlined proceedings and expeditious results, on one hand, and litigation's in-court protections and rigorous review, on the other. *See* Kathleen M. Scanlon, *Class Arbitration Waivers: The 'Severability' Doctrine And Its Consequences*, 62 Disp. Resol. J. 40, 42 (2007) (class arbitration imports "collective action into the arbitration context").

Class-action procedures, in effect, render arbitration "a private judicial system that looks

and costs like the litigation it's supposed to prevent." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, Harv. Bus. Rev. 120, 120 (May 1994). The resulting hybrid nullifies traditional arbitration's expedition, informality, and cost-savings benefits in several ways.

First, and most obviously, class treatment means that rather than resolving a one-on-one bilateral dispute, the proceeding involves "many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. As the Court recently recognized in *Stolt-Nielsen*, that shift is not a mere adjustment to the "procedural mode." *Id.* Rather, it is a "fundamental change[]" that radically transforms the nature of the proceedings and the parties' bargain. *Id.*

Second, precisely because hundreds or thousands of parties have been swept into the fold, class treatment significantly raises the financial stakes of the arbitration. When arbitration is individualized, businesses willingly assume the risk of an adverse award subject to only minimal review because that risk is dwarfed by the overall cost savings and likelihood of prevailing in some other number of individual cases. Class arbitration, however, raises the stakes in a way that fundamentally alters that calculus; "the relative benefits of class-action arbitration are much less assured." *Id.* at 1775-76. A single, erroneous arbitral award, once multiplied by a vast number of class members, could potentially be

devastating and business-imperiling. *See id.* at 1776 (commercial stakes of class arbitration are "comparable to those of class-action litigation"). Parties willing to forgo the more extensive review associated with litigation in exchange for streamlined procedures will likely not make the same trade-off if class arbitration is required, given such substantial risks.

Third, class arbitration combines the enormous costs of class actions with the bare-bones procedural protections of arbitration. Arbitration, for example, allows for only "severely limited" judicial review of the arbitrator's decision, *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) — "among the narrowest known to law." *Dominion Video Satellite, Inc. v. Echostar Satellite LLC*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted); Clancy et al., 63 BUS. LAW at 70 n.80 (as of late 2007, no court had ever reversed an arbitrator's class certification order). A party seeking to vacate a class arbitration award may not obtain vacatur upon a showing of "serious error," but rather must demonstrate a "'manifest disregard' of the law." *Stolt-Nielsen*, 130 S. Ct. at 1766-67.

At the same time, class arbitration injects a host of complexities that threaten the principal benefit of arbitration — namely, efficiency. Parties to class arbitration must engage in substantial discovery to determine whether the numerosity, typicality, commonality, and adequacy-of-representation requirements are satisfied for the putative class. Parties must also submit briefing and participate

in hearings about whether the class prerequisites are satisfied. Indeed, the American Arbitration Association's ("AAA") rules for class arbitrations largely mirror the Federal Rules of Civil Procedure from the private judicial system — the very system intended to be bypassed for the simpler alternative of arbitration. *See* AAA, *Commercial Arbitration Rules And Mediation Procedures*, http://www.adr.org/sp.asp?id=21936.

Fourth, class arbitration draws out the resolution process, thus compounding the costs for the parties. *Cf.* AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, http://www.adr.org/si.asp?id=5027 (AAA-administered consumer arbitrations proceed to an award in approximately 4-6 months). The discovery process for class certification can itself span many months or years. The quantum of evidence, witnesses, and discovery involved in addressing a carrier's practices on a statewide or nationwide basis is exponentially larger than that needed to address a single customer's dispute. And because the commercial stakes of a class arbitration award are so high, the likelihood of appeal is greater despite the limited scope for judicial review — thus adding the additional complexities, costs, and delays of motions to vacate and cross-motions to confirm arbitrators' decisions.

Even when the defendant prevails in or settles a class arbitration, finality is hardly assured. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), established that class actions "implicate the due process principle ... that one is not bound by a

judgment *in personam* in a litigation in which he is not designated as a party." *Id.* at 846. It remains to be seen, then, whether absent class members could successfully challenge an arbitrator's decision on due process grounds — for example, contending that they had no say in the selection of the arbitrator. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 113 (2000).

Ultimately, compelling parties who entered agreements for individual arbitration to accommodate class-wide claims unravels much of what made arbitration an attractive, fair, and efficient option in the first place. As *Stolt-Nielsen* makes clear, insisting on class arbitration is not some procedural tweak, but a fundamental reshaping of the parties' bargain. The resulting new arrangement is not one many businesses would willingly accept. That is not mere supposition when it comes to wireless carriers. As noted, many wireless carriers agreed to arbitrate on the express condition that arbitration be individualized. *See supra* at 8-9 n.3. For wireless carriers, the Ninth Circuit's decision eliminates many if not all of the assumed and established benefits of traditional arbitration.

C. If States May Superimpose Class Action Procedures On Arbitration Agreements, Businesses Will Drop Arbitration Altogether And Consumers Will Suffer.

If States are free to condition the enforceability of arbitration agreements on the availability of

class-wide arbitration procedures, companies are likely to abandon arbitration altogether. Thus, in practice, conditioning the enforceability of arbitration agreements on the availability of class arbitration amounts to a bar on arbitration. Because the Ninth Circuit's decision means that parties' requests for individual arbitration will not be honored by the courts, many companies will opt not to engage in arbitration going forward.

The abandonment of arbitration for litigation is a contractual certainty for many wireless carriers: The arbitration clauses in the terms of service of many CTIA members expressly provide that their arbitration clauses have no force if the class waiver is deemed unenforceable. Sprint Nextel's service agreement, for example, states that "[i]f for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then our agreement to arbitrate doesn't apply and the dispute *must be brought in court*." Sprint Nextel Service Agreement (emphasis added), http://shop.sprint.com/en/legal/legal_terms_privacy_popup.shtml. Verizon's agreement similarly provides that "[i]f for some reason the prohibition on class arbitrations ... cannot be enforced, then the agreement to arbitrate will not apply." Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp. Comcast, meanwhile, inserted a "Special Note Regarding Arbitration for California Customers" in its service agreement in the wake of the Ninth Circuit's decision to announce that it would "not seek to enforce the arbitration provision above" against

any Comcast customer in the State. Comcast Service Agreement, *available at* http://www.comcast.net/terms/.

Even when the contract itself does not provide an explicit escape hatch, the practical effect of a state-law insistence on class arbitration will be a frustration of the federal purpose of encouraging arbitration. Comcast's response to the First Circuit's decision in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), is illustrative of those pressures to abandon arbitration altogether. In *Kristian*, a class of cable subscribers alleged various antitrust violations, leading Comcast to file a motion to compel arbitration on their claims. The First Circuit allowed plaintiffs' antitrust claims to proceed in a class arbitration, deeming Comcast's individual-claim-only provision in its arbitration agreement unenforceable. The First Circuit pointedly noted, however, that Comcast could withdraw its motion to compel arbitration "if it d[id] not like the conditions that now apply to the arbitral forum." *Id.* at 63 n.25. Comcast promptly dropped its motion to compel arbitration. *See Kristian v. Comcast Corp.*, 469 F. Supp. 2d 1 (D. Mass. 2006). The prospect that wireless carriers and other businesses will be disinclined to engage in arbitration going forward, once the process is sapped of its traditional benefits, is thus a real and not merely hypothetical danger.

Nor would wireless carriers and other businesses be inclined to adopt a bifurcated approach — engaging in individual arbitration *while* litigating class actions in court. The

significant costs of arbitration are worthwhile to a carrier only where it knows that *all* customer disputes will be resolved through the arbitral process. Arbitration is hardly cost-free for consumer businesses. The businesses typically shoulder substantial costs that consumers would bear themselves if the disputes were litigated. Under American Arbitration Association rules, consumer costs are generally capped at $125 for claims under $10,000; the carriers pay the balance, subsidizing costs that can amount to thousands of dollars per day. *See* AAA, *Non-Binding Arbitration Rules For Consumer Disputes And Business Disputes*, http://www.adr.org/sp.asp?id=35917. Many carriers, in fact, include even more favorable provisions.[4] But when there is no assurance that all claims will be arbitrated in lieu of litigation, and a carrier must shoulder the additional costs of class action litigation, subsidizing the costs of individual arbitration is no longer a rational business option. The simplest way forward, from the carrier's perspective, would be to disengage from arbitration altogether.

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[4] T-Mobile, for example, "will pay *all* filing, administration and arbitrator fees for claims that total less than $75,000." T-Mobile Service Agreement (emphasis added), http://www.t-mobile.com/Templates/Popup.aspx?WT.z_unav=ftr__TC&PAsset=Ftr_Ftr_TermsAndConditions&print=true. Verizon Wireless, meanwhile, offers a free voluntary mediation program and pays "any [arbitration] filing fee" and any other "administrative or arbitrator fees charged later" for customers who participate in the program. *See* Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp.

Thus, when courts superimpose class-wide treatment on individual-claim-only arbitration agreements, they are not engaged in some minor procedural tinkering. The inevitable effect of imposing class arbitration on unwilling parties is that many companies will withdraw from arbitration for all consumer disputes, whether individual or class-wide. Consumers with truly individualized disputes not suitable for class treatment will be much worse off, but the clearest victim will be the FAA's federal policy to promote and further arbitration.

D. The Decision Below Injects State-By-State Confusion Into The Enforceability Of Nationwide Agreements.

The consequences of the Ninth Circuit's decision for wireless carriers and other companies with nationwide businesses and customer agreements will not be easily cabined. Although the holding below was predicated on California unconscionability law, the consequences for wireless carriers extend nationwide.

Each wireless carrier, respectively, utilizes a single contract for customers nationwide and service that is provided nationwide. The enforceability of those nationwide customer service agreements will now vary from State to State, forcing carriers to adopt different rules for different geographical markets. A regime in which a carrier's uniform arbitration provisions are invalid in one State but valid in another undermines the benefits of having a uniform contract to govern customer relationships across the country. The

FAA's federal policy promoting arbitration should allow nationwide carriers to enforce a nationwide policy when it comes to arbitration.

If left to stand, the Ninth Circuit's decision means that — at a minimum — all individual-claim-only arbitration provisions as applied to California customers are unenforceable. The size of the California market alone cannot be understated; indeed, the locus of consumer protection litigation already lies in the California courts. *See* CTIA Br. Supporting Cert Petition, *AT&T Mobility, Inc. v. Concepcion, et. al.* (09-893), at 13-15; Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation Preliminary Report*, at 21 (Dec. 2009), http://www.law.northwestern.edu/searlecenter/uploads/CPA_Proof_113009_final.pdf. That trend is compounded by the Ninth Circuit's decision last year that out-of-state residents may also challenge arbitration agreements as violating California law. *See Masters v. DirecTV, Inc.*, No. 08-55825, 2009 WL 4885132 (9th Cir. Nov. 19, 2009) (California's "fundamental policy" against class-action waivers is not limited to California residents). Plaintiffs' lawyers now have every incentive to bring suit in California to avoid adverse FAA preemption rulings.

The potential impact of the decision below extends far beyond California, however. The decision below, if affirmed, will give state courts that have long been "skeptical of arbitration" a clear roadmap "to evade the Supreme Court's pro-arbitration directives while simultaneously

insulating their rulings from Supreme Court review." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1420 (2008). Indeed, state unconscionability laws have become increasingly prevalent grounds for holding arbitration agreements unenforceable in recent years. One academic estimates that whereas unconscionability challenges "once appeared in less than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases" involving arbitration. *Id.* at 1441.

As noted above, Comcast's response to the Ninth Circuit's decision was to insert a California-customer-specific non-enforcement policy into its nationwide service agreement. The move to incorporate state-specific rules, however, only underscores the incongruence of having a nationwide agreement whose enforceability varies from State to State.

The prospect of being forced into State-by-State enforceability litigation again defies both the federal purposes of the FAA and the parties' intent in adopting a nationwide service agreement. Going forward, it will further compel carriers to extricate themselves from arbitration altogether — and further underscore the stark conflict between the Ninth Circuit's decision below and the FAA's national policy favoring arbitration.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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August 9, 2010

AMICUS CURIAE BRIEF

No. 09-893

In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* DIRECTV, INC., COMCAST CORP., AND DELL INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

DIRECTV, Inc.[1] is the leading provider of satellite television programming services in the United States, with over 18 million customers nationwide. Since June 1994, when DIRECTV premiered the nation's first direct broadcast satellite service, DIRECTV has always had an individual arbitration agreement in its Customer Agreement. DIRECTV supports the arguments favoring individual arbitration.

Comcast Corporation is a leading provider of entertainment, information and communication products and services. As of June 30, 2010, Comcast's cable systems served approximately 23.6 million video customers, 16.4 million high-speed Internet customers and 8.1 million phone customers in 39 states and the District of Columbia. Comcast has provided wired communications service to consumers since 1963, and Comcast has relied on arbitration provisions to facilitate the resolution of disputes with its customers for more than a decade. Comcast Corporation supports the arguments favoring individual arbitration.

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[1] Through correspondence filed with the Clerk of the Court, the parties have granted blanket consent to the filing of *amicus curiae* briefs in this case. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* affirm that no counsel for any party wrote this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Dell Inc. delivers innovative technology and services that customers trust and value. As a leading technology company, Dell offers a broad range of product categories, including mobility products, desktop PCs, software and peripherals, servers and networking, and storage. For more than a decade, Dell has relied on arbitration provisions in its consumer terms and conditions to provide for inexpensive and expeditious dispute resolution. These arbitration agreements apply to millions of customers in the United States. Dell Inc. supports the arguments favoring individual arbitration.

SUMMARY OF *AMICI CURIAE*'S ARGUMENT

Ignoring this Court's admonition that arbitration "is a matter of consent, not coercion" (*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), California courts and the Ninth Circuit have presented companies doing business in California with a stark choice: class arbitration or no arbitration. These courts have held that it is unconscionable for businesses and their customers to agree to resolve disputes on an individual basis in arbitration, even where arbitration provides a quick, convenient, low-cost method of pursuing claims. But in striking down individual arbitration agreements as unconscionable, California courts and the Ninth Circuit have not been applying unconscionability doctrine in the way that they traditionally apply it to non-arbitration contracts. Instead, they have been applying a new, arbitration-specific unconscionability test, which invalidates individual arbitration agreements not because the terms "shock the conscience," but because they do not comport with California courts' paternalistic policy judgment

that the only good way for consumers to resolve their disputes is on a classwide basis.

Businesses have responded to California's hostility to individual arbitration agreements largely by abandoning arbitration as a method of dispute resolution with their California customers. Some have removed arbitration clauses entirely from their customer agreements. Others have elected not to enforce their arbitration provisions with California customers (or customers from other states that have imposed similar bans on individual consumer arbitration). These businesses have few other options. Individual arbitration is attractive to companies because it is, by definition, quick, inexpensive, and final. Class arbitration eliminates many of these benefits by transporting class action apparatus, which courts are uniquely qualified to manage, into an arbitral forum. The result is a slow, multi-phase arbitration that can cost businesses millions of dollars. And while finality is a virtue in individual arbitration, it is too great a risk to bear in classwide arbitration. When potential multimillion dollar class judgments are at issue, businesses must have a way to appeal erroneous rulings.

Businesses' forced retreat from arbitration harms both consumers and businesses. While one of the assumptions underlying California courts' and the Ninth Circuit's decisions is that class proceedings are the best way for consumers to pursue claims, the assumption is questionable. Consumers who want a fast, straightforward resolution to their individual disputes can obtain that in arbitration, while in class actions, they will often wait years for little individual reward. Indeed, many consumers, according to empirical evidence ignored by California

courts, are happy with the outcomes when they individually arbitrate, and have more favorable views of arbitration than they do of court. In addition, businesses that have structured transactions with their customers in reliance on the FAA and consistent rulings from this Court favoring arbitration will now either have to absorb the increased costs of class action litigation or pass them onto their customers through increased prices for goods and services.

Amici urge this Court to reaffirm the principles underlying the FAA, and to disapprove California courts' and the Ninth Circuit's use of arbitration-specific unconscionability standards to strike down reasonable consumer arbitration agreements.

I. ARBITRATION PROVISIONS HAVE BECOME INCREASINGLY CONSUMER-FRIENDLY.

Although the frequency with which California courts and the Ninth Circuit strike down arbitration provisions suggests otherwise, most arbitration provisions are not designed to discourage consumers from bringing claims. While consumer arbitration provisions in the late 1990s may have contained more onerous terms for consumers, such provisions are largely a thing of the past. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring The Recent Judicial Skepticism Of The Class Arbitration Waiver And Innovative Solutions To The Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477, 503-04 (Spring 2009) (noting that while "some avaricious drafters" formerly included terms prohibiting punitive damages and attorneys fees, requiring the arbitration to proceed in a remote

location, requiring the consumer to pay half or all of the arbitration fees, or giving the company the sole authority to select the arbitrator, such terms have given way to a guiding principle of "fairness to the consumer").

Thus, AT&T's arbitration provision in this case, which uses innovative incentive schemes to guarantee that consumers can fully vindicate their claims, is by no means unique in its effort to ensure that consumers have meaningful access to a fair arbitration process. For example, *amici* include a number of consumer-friendly provisions in their agreements to ensure that arbitration is an accessible forum. Under these agreements, the company bears all or nearly all of the costs of arbitration, and the arbitration takes place in a convenient location in the customer's home state. *See, e.g.*, DIRECTV Customer Agreement §§ 9(b), 10(b) (effective Apr. 24, 2010), http://www.directv.com/DTVAPP/content/legal/customer_agreement (providing for arbitration "at a location in [customer's] hometown area", governed by the FAA, in which DIRECTV pays all arbitration costs, with the possible exception of "an arbitration initiation fee equal to [customer's home state's] court filing fee, not to exceed $125"); Comcast Agreement for Residential Services §§ 13(e), (f), (g), *at* http://www.comcast.net/terms/subscriber/ (providing for an arbitration "at a location, convenient to you, in the area where you receive the service from us", governed by the FAA, in which Comcast advances all costs of the arbitration).

Indeed, whether or not companies voluntarily include such consumer-friendly measures in their arbitration provisions, most arbitration providers

will now impose them as a condition of administering a consumer arbitration. The Judicial Arbitration and Mediation Service (JAMS), for example, has adopted a policy that guarantees certain standards of fairness in consumer arbitrations. *See JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness* (effective July 15, 2009), available at http://www.jamsadr.com/rules-consumer-minimum-standards/. The policy requires, among other things, that the consumer's fee to participate in arbitration be capped at $250, that both parties have access to small claims court, that all remedies available in court remain available in arbitration, that the consumer have a right to a hearing in his or her hometown area, that there is a right to at least limited discovery, and that the consumer gets to participate in arbitrator selection. *Id.* JAMS will administer arbitrations between consumers and businesses only if they comply with these minimum standards. *Id.* The American Arbitration Association (AAA) has also adopted a set of guidelines for consumer arbitrations, called the Consumer Due Process Protocol, which contains similar minimum requirements. *See* American Arbitration Association (AAA), *Consumer Due Process Protocol*, available at http://www.adr.org/sp.asp?id=22019.

When consumers use arbitration to resolve their disputes, they are happy with the results. Empirical studies have shown, for example, that arbitrations are resolved in favor of consumers at least half the time. *See* U.S. Chamber Institute for Legal Reform, *Arbitration - A Good Deal for Consumers* (2008), available at www.instituteforlegalreform.com/

get_ilr_doc.php?docId=1091 (stating that approximately 60% of AAA's consumer arbitration cases are settled by mutual agreement, and that consumers prevail approximately half the time when they are proceeding as claimants); *see also* Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association* (2009), available at http://www.searlearbitration.org/p/full_report.pdf (providing that in consumer arbitrations before the AAA, consumer-claimants prevailed 53.3% of the time).

In addition, arbitration is faster and often less expensive for consumers than litigation. *See* U.S. Chamber Institute for Legal Reform, *Arbitration - A Good Deal for Consumers* at 7-8, 22-24 (2008), available at www.instituteforlegalreform.com/get_ilr_doc.php?docId=1091 (summarizing evidence that arbitration offers consumers a faster method of dispute resolution than litigation and that it is often less expensive). In a national survey of adults who had participated in a binding arbitration that reached decision, the arbitration participants perceived the arbitration as faster (74%), simpler (63%), and less expensive (51%) than litigation. Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster than Litigation* (2005), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf.[2] 66% of

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[2] The results are similar in the employment context. In *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777 (2003), Elizabeth Hill provides a detailed empirical analysis of the cost-

(Continued...)

participants surveyed said they were likely to use arbitration again. *Id.*

II. CALIFORNIA COURTS AND THE NINTH CIRCUIT HAVE BEEN STRIKING DOWN CONSUMER-FRIENDLY AGREEMENTS UNDER A NEW, ARBITRATION-SPECIFIC "UNCONSCIONABILITY" TEST.

In recent years, California courts have grown increasingly hostile to individual arbitration provisions in consumer contracts. Overlooking the many features of arbitration that make it attractive for both businesses and consumers, courts have routinely invalidated arbitration agreements solely on the basis that they do not allow consumers to pursue claims on behalf of a class. Courts strike down these arbitration provisions as "unconscionable," but the unconscionability analysis they use is tailored to arbitration agreements, and differs from the unconscionability test applied to other contracts.

In California, an unconscionable contract has been variously described as a contract where "the inequality amounting to fraud [is] so strong and manifest as to *shock the conscience* and confound the judgment of any man of common sense" or one that "[n]o man in his senses and not under delusion

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effectiveness of arbitration in employment disputes. Hill ultimately concludes that arbitration is often the only method by which middle- and lower-income employees can resolve their disputes with employers, because of the prohibitive costs of litigation. *Id.* at 782-83.

would make on the one hand, and as no honest and fair man would accept on the other." *Cal. Grocers Ass'n v. Bank of Am.*, 22 Cal. App. 4th 205, 214-15 (1994) (citations and internal quotations omitted). California courts, at least outside of the arbitration context, have made clear that the determination that contract terms are unconscionable is not one that should be made lightly:

> With a concept as nebulous as 'unconscionability' it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.

Am. Software, Inc. v. Ali, 46 Cal. App. 4th 1386, 1391 (1996).

Failing to heed these warnings about paternalistic intervention, both the Ninth Circuit and California courts have imposed their own judgment as to what is best for consumers in California (and across the nation) by striking down arbitration provisions as unconscionable when they do not, to any reasonable mind, "shock the conscience." Instead, these courts have invalidated arbitration provisions under a new arbitration-specific "unconscionability" test, which provides that an arbitration agreement containing a class waiver is "unconscionable" where it is:

> found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining

> power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.

Discover Bank v. Super. Ct., 36 Cal. 4th 148, 162-63 (2005).

Since the California Supreme Court articulated this standard in 2005, virtually no arbitration agreement with a class action waiver that has been reviewed under California law has survived. It has become an effective across-the-board ban on individual consumer arbitration agreements.[3] But it

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[3] While arbitration agreements were only supposed to be unconscionable where there were "small amounts of damages" at stake, what constitutes a "small amount" has crept ever-higher. *See, e.g., Cohen v. DIRECTV, Inc.*, 142 Cal. App. 4th 1442, 1452 (2006) (striking down DIRECTV's arbitration provision, holding that "[d]amages that may or may not exceed $1,000 do not take DirecTV's class action waiver outside 'a setting in which disputes between the contracting parties predictably involve small amounts of damages . . . .'"); *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1067-68 (N.D. Cal. 2007) (where plaintiff had more than $4,000 at stake individually, determining that the amount at issue was "not substantial" and invalidating arbitration agreement as unconscionable); *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1083, 1086 (9th Cir. 2010) (finding arbitration provision with class action waiver unconscionable under California law where customer's damages ranged from $1,200 to $1,500). In the employment arbitration context, California courts have reached similar conclusions with even higher amounts at stake. *See, e.g. Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277, 1295 (2009) (deeming arbitration provision with class waiver invalid where a meal and rest period violations claim against an employer totaled $10,250, an amount the court found was "too low, as a practical matter, to be pursued as an individual claim, either in court or through arbitration").

does not "shock the conscience" (*Cal. Grocers Ass'n*, 22 Cal. App. 4th at 214-15) for consumer agreements to require pursuing claims on an individual basis in a no-cost arbitration, where the consumer has hundreds or thousands of dollars at stake or is guaranteed to be able to vindicate his claims. Nor is someone who would agree to pursue such a claim on an individual basis in arbitration acting "under delusion." *Id.* Were it actually true that no rational consumer would consider it worth his while to pursue an individual claim for relatively small amounts of actual damages, small claims courts in California (which only adjudicate claims of $7,500 or less) would have to close their doors. People who believe they are owed money may rationally pursue those claims on an individual basis and, in many cases, would actually *prefer* to do so. Rather than pursue a time-consuming class action where the individual rewards are likely to be minimal, a consumer with a relatively small claim may benefit from the quick, informal, low-cost resolution that arbitration provides.

Indeed, this Court has endorsed the use of individual arbitration in such cases. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), a seven-Justice majority rejected the argument that consumers would benefit from increased state regulation of arbitration. The Court explained:

> We agree that Congress, when enacting [the FAA], had the needs of consumers, as well as others in mind. Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. . . . We are uncertain, however,

> [that plaintiff's proposed test would help consumers]. . . . [I]t would permit, say, local business entities to disavow a contract's arbitration provisions, thereby leaving the typical consumer who has only a small damages claim (*who seeks, say, the value of only a defective refrigerator or television set*) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.

Id. at 280-81 (citation and internal quotation omitted, emphasis added).

Nevertheless, the contrary reasoning of the courts applying *Discover Bank* has gained traction beyond California. While it remains the minority view that courts can, consistent with the FAA, invalidate arbitration agreements based purely on the presence of a class waiver, several states have adopted some form of new unconscionability standard to do just that. *See, e.g., Feeney v. Dell Inc.*, 908 N.E.2d 753, 764 (Mass. 2009); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006-07 (Wash. 2007); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007). Plaintiffs' lawyers have already begun to manipulate these tests in an attempt to render otherwise valid arbitration agreements "unconscionable."

In *Dale*, for example, the Eleventh Circuit, applying Georgia law, determined that a class action waiver may render an arbitration provision unconscionable if, among other factors, a consumer has only low-value claims that do not give rise to an automatic award of attorneys' fees. *Dale*, 498 F.3d at 1224. Plaintiffs immediately took advantage of this standard by filing a lawsuit against DIRECTV,

pleading only causes of action that would not entitle them to recover statutory attorneys' fees, and refusing to plead available causes of action that do provide for such relief. *See Jones v. DIRECTV, Inc.*, 2010 WL 2232265, at *2 (11th Cir. June 3, 2010) (petition for rehearing pending). Plaintiffs then argued that because the claims they chose to plead on a classwide basis provided for such minimal recovery, the plaintiffs had so little incentive to arbitrate individually that the arbitration provision must be unconscionable. *Id.* The Eleventh Circuit recently accepted the plaintiffs' argument, permitting plaintiffs to unilaterally render their arbitration agreements "unconscionable" through a later-filed, artful court pleading. *Id.*

Courts in California and elsewhere have been imposing their own judgments that class procedures are better for consumers than individual arbitration, no matter the amount at stake, and no matter how consumer-friendly the arbitration process. Not only are courts ill-equipped to be making a policy decision that the concept of individual consumer arbitration is almost always unconscionable, but they are not permitted to do so consistent with the FAA.

III. IF CLASS ARBITRATION MUST BE USED TO RESOLVE CONSUMER DISPUTES, BUSINESSES WILL NO LONGER ARBITRATE SUCH DISPUTES.

This Court has repeatedly recognized that, by enacting the FAA, "Congress declared a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also Preston v. Ferre*, 552 U.S. 346, 353 (2008) (same); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477,

481 (1989) (acknowledging "our current strong endorsement" of arbitration as a method of dispute resolution). But by conditioning the enforceability of arbitration agreements on the availability of class procedures, California has in effect put an end to arbitration in the consumer context.

In selecting arbitration, parties agree to a trade-off: they "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) ("[R]ecognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration."). But in class arbitration, the "simplicity, informality, and expedition" (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) that are the hallmarks of traditional arbitration are lost.

Class arbitration proceedings are far from simple, because all of the procedures attendant to class litigation are imported into the arbitral forum. *See* Alan Kaplinsky & Mark Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 Bus. Lawyer 1289, 1299 (2003) (noting that because class arbitration "require[s] extensive adjudication to ascertain and protect the rights of absent class members . . . [it] thereby [forfeits] the speed and efficiency that

individual arbitration offers"); *see also generally* Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1712-13 (2005) (describing class arbitration as "a complex hybrid of arbitration and litigation in which the judge and arbitrator are constantly trading off responsibility for different aspects of the case"). And class arbitrations are far more expensive than individual arbitrations, because they get bogged down in the same costly discovery and class certification processes that would occur in court, but with the additional cost of arbitrators' fees. *See* David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Acts' Legislative History*, 63 Bus. Lawyer 55, 72-73 (2007) (noting that class arbitrations require payment of substantial arbitrator fees because "parties could want multiple arbitrators for a class arbitration, to avoid staking such a substantial [unappealable] matter on the judgments of a single person" and that "securing a panel of arbitrators could potentially triple the overall hourly arbitrator fee").

Moreover, the finality of arbitration that is normally considered a benefit becomes too much of a risk, with arbitrators having the power to issue multi-hundred-million dollar awards. Even if parties wished to hedge against some of that risk, and prolong the process even further by agreeing to appellate review of any class arbitration award, they are powerless to do so. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) (holding that limited statutory grounds for vacatur

and modification of arbitration awards may not be supplemented by contract).

Faced with the choice of an expensive, drawn-out arbitration with an unappealable ruling, or no arbitration at all, businesses, including *amici*, are choosing no arbitration at all. In response to California and other states' hostility to arbitration, DIRECTV and Comcast no longer seek to enforce their arbitration provisions in states like California that seek to require classwide procedures in arbitration. *See, e.g.*, DIRECTV Customer Agreement § 9(c), at http://www.directv.com/DTVAPP/content/legal/customer_agreement (providing that "[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable"); Comcast Agreement for Residential Services § 13, at www.comcast.net/terms/subscriber/ ("SPECIAL NOTE REGARDING ARBITRATION FOR CALIFORNIA CUSTOMERS: IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE."). Another company, Amazon.com, removed the arbitration provision from its customer agreements for all customers nationwide in direct response to *Scott*, 161 P.3d 1000, which effectively adopted the *Discover Bank* test in Washington.

Even where parties have arbitration provisions that may arguably pass muster under the *Discover Bank* approach, they are chilled from trying to enforce the provisions for fear of potential liability. California's Consumers Legal Remedies Act, Cal.

Civ. Code § 1770(a)(19), makes it a violation of California law to "[i]nsert[] an unconscionable provision in [a] contract" and thus a failed attempt to enforce an arbitration provision could potentially lead to subsequent lawsuits by aggressive plaintiffs' lawyers. For example, after DIRECTV moved unsuccessfully to enforce its individual arbitration provision with one customer who sought more than $1,000 in damages, the customer filed a second lawsuit for damages arising out of DIRECTV's attempt to enforce an "unconscionable" arbitration provision. *See Cohen v. DIRECTV, Inc.*, 2008 WL 5393181 (Cal. Ct. App. Dec. 1, 2008). While such lawsuits are highly questionable both under state law and the FAA, the risk of them has further interfered with businesses' ability to enforce their arbitration agreements. Consequently, Comcast, which allows its customers to opt out of arbitration (Comcast Agreement for Residential Services § 13(c)), still does not try to enforce its arbitration provision in California, where there is law suggesting that even the ability to opt out does not save an individual arbitration agreement. *See Gentry v. Super. Ct.*, 42 Cal. 4th 443, 450-51 (2007) (concluding that "notwithstanding [an] opt-out provision" an arbitration provision had an element of procedural unconscionability, thus subjecting it to review for substantive unconscionability).

While the avowed intention of courts invalidating arbitration clauses as unconscionable is to assist consumers, such action can produce the opposite result. First, as to those consumers who would prefer informal, individual resolution of disputes, it takes away an agreed-upon avenue of dispute resolution that has proven benefits for each of the parties. *See* Section I, *supra*.

Second, while California courts and the Ninth Circuit have assumed that classwide proceedings benefit consumers, that assumption is at least questionable. The individual putative class member, in fact, often fares poorly compared to the attorneys helming the class action. *See* John H. Beisner, et al., *Class Action "Cops": Public Servants Or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1447 (2005) (noting that some class actions "effectively amount to a transfer of wealth from a company to a class action lawyer, with no real work accomplished by the plaintiffs' lawyer and no real benefit to the consumers on whose behalf the suit was supposedly brought"); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 Geo. J. Legal Ethics 1343, 1346-48 (2005) (summarizing cases where putative class members received only low-value coupons in settlement, while attorneys received high fee awards); S. Rep. No. 109-14 at 15 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 16 (Senate Committee Report on the Class Action Fairness Act, noting the "numerous class action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing"); Thomas B. Leary, *The FTC and Class Actions*, Remarks at the Class Action Litigation Summit (June 26, 2003), available at http://www.ftc.gov/speeches/leary/classactionsummit.shtm (noting FTC's concern "about settlements that do not adequately compensate injured consumers, either because they only provide class members with largely worthless discount coupons or because the class action lawyers are awarded a too generous share of the proceeds").

And third, the shift away from individual arbitration to more costly class litigation may hurt all consumers financially. Increased litigation costs have to be borne by someone, and if the business itself does not absorb them, they will be passed along by way of price increases for goods and services. *See* Stephen J. Ware, *Paying The Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 89-90 (2001); *see also* John C. Coffee Jr., *Commentary on Joel Seligman, The Quiet Revolution: Securities Arbitration Confronts The Hard Questions*, 33 Hous. L. Rev. 376, 377 (1996) (arguing that "as transaction costs are reduced [from arbitration], firms in a competitive industry... will reduce their charges to customers").

IV. CONCLUSION

Businesses and their customers are supposed to be able to rely on courts enforcing their contracts as written. But deciding that they know what is best for consumers better than the consumers themselves, California courts and the Ninth Circuit have cast aside millions of agreements to arbitrate under an "unconscionability" test that is no more than thinly-disguised hostility towards individual arbitration agreements. California's approach violates the FAA. Unwilling to accept California's mandate that they submit to classwide procedures in arbitration to which they have not agreed, some businesses have simply stopped agreeing to arbitrate consumer disputes, and others will inevitably follow. Because, under the FAA, parties should be free to enter reasonable agreements to arbitrate, and because arbitration has long been a favored method

of dispute resolution, *amici* request that this Court reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted.

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v.

VINCENT and LIZA CONCEPCION,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are distinguished professors of law from several leading law schools across the country ("Amici Law Professors"). Amici Law Professors have lectured and written extensively on issues of contract law and arbitration. They support the enforcement of arbitration clauses as written and oppose California courts' distortion of unconscionability doctrines in order to refuse to enforce agreements to arbitrate. Amici Law Professors believe that this discrimination against agreements to arbitrate by California courts is preempted under the Federal Arbitration Act. A list of amici are set forth in the appendix hereto.

SUMMARY OF THE ARGUMENT

For centuries prior to the Federal Arbitration Act ("FAA"), courts systematically refused to enforce arbitration agreements. Ever protective of their jurisdiction, English courts—and American courts following their lead—treated agreements to arbitrate as a lower class of contract, refusing to enforce them under special doctrines applicable only to arbitration agreements.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

In 1925, Congress enacted the FAA in order to remedy this longstanding judicial hostility to arbitration. The heart of the FAA—Section 2, 9 U.S.C. § 2—displaces otherwise applicable law, making arbitration agreements "valid, irrevocable, and enforceable," as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract."

As a consequence, Section 2 expressly displaces otherwise applicable contract law and creates a federal law of arbitrability. The twin purposes of the statute are to prohibit special rules for the interpretation or enforcement of arbitration agreements, such as were employed by courts prior to 1925, and to promote the use of more expeditious and inexpensive forms of conflict resolution. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). Section 2 also has a savings clause, which preserves state contract law applicable to the "revocation" of "*any* contract." 9 U.S.C. § 2 (emphasis added). In other words, general principles of state contract law, applicable to the formation of *all contracts or all clauses in any contract* may be applied to agreements to arbitrate. Like any savings clause, the exceptions to preemption in Section 2 cannot be read to swallow the rule. *See AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 228 (1998) ("[T]he act cannot be held to destroy itself." (citation omitted)).

"By enacting [Section] 2, Congress precluded States from singling out arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), creating a kind of "equal protection clause" for contracts to prevent courts from discriminating against arbitration agreements as compared with other

contracts. In other words, state law may not be employed in a manner that disfavors—*de jure* or *de facto*—arbitration agreements as compared with other contracts. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Indeed, even when employing state law doctrines of "general applicability," courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to disfavored treatment. *See Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 167 (5th Cir. 2004).

But this is precisely what California courts do. Under the guise of applying generally applicable contract law, California courts have distorted the doctrine of unconscionability in order to erect an insurmountable barrier to bilateral arbitration in all consumer contracts. This new manifestation of the same hostility to arbitration involves an assumption that individual arbitration cannot vindicate consumer rights or deter wrongdoing and therefore requires the imposition of complex litigation procedures on arbitration. While prior to 1925 courts simply refused to enforce arbitration clauses in favor of a judicial forum, California courts (with the Ninth Circuit as a willing participant) simply attempt to convert arbitration into a judicial proceeding.

Unconscionability has two elements—procedural and substantive—and California courts distort them both. Instead of looking to all the circumstances surrounding the formation of the contract, California courts have adopted a *per se* rule under which arbitration agreements contained in standardized form contracts *are automatically considered procedurally unconscionable. See, e.g., Flores v. Transamerica*

HomeFirst, Inc., 93 Cal. App. 4th 846, 853 (2001). As to the substantive side of the analysis, California's distortion of the law is even worse. Instead of the traditional "shock-the-conscience" test, California courts have imposed a "mutuality" test that requires mutuality of obligation with respect to arbitration. *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 117-18 (2000). This mutuality test is not a general principle of contract law—ordinarily, not every term of a contract need be completely parallel if consideration supports both sides of the contract. Thus, the new test, applied by the court below, sets a much lower bar for substantive unconscionability.

Unconscionability is a defense to the enforcement of an otherwise valid contract. As such, the party asserting it bears the burden of proof. But California's new unconscionability test for arbitration clauses places the burden on the party attempting to enforce the arbitration clause. That party must demonstrate that the agreement to arbitrate will not operate as an "exculpatory clause," but instead will offer both vindication of individual rights and deterrence of alleged wrongdoing. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160-61 (2005). This mutuality test and the "exculpatory clause" analysis—with the shift in the burden of proof—*is only applicable to arbitration clauses*. In fact, the mutuality test has been repeatedly rejected by California courts outside the context of arbitration. *See, e.g.*, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 672 n.14 (1988).

No less than a statutory provision, the new "unconscionability" doctrine created by the California courts is preempted by the plain language of Section 2 of the FAA. It discriminates against arbitration agreements, essentially banning them from an entire class of standard form contracts, and it imposes a complex judicial procedure on arbitration. If arbitration as envisioned by the FAA is to survive in the 21st century, the judgment of the Ninth Circuit must be reversed.

ARGUMENT

I. THE FAA PREEMPTS STATE LAW THAT UNIQUELY DISFAVORS ARBITRATION AGREEMENTS.

A. Congress Enacted The Federal Arbitration Act To Remedy Longstanding Judicial Hostility To Arbitration Agreements.

For centuries, English and American courts routinely refused to enforce agreements to arbitrate. This hostility was a product of jurisdictional jealousy and a distrust of both arbitrators and arbitration procedures that began in "'ancient times,'" when English courts fought "'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'" *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring) (quoting *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915) (quoting *Scott v. Avery*,

5 H.L. Cas. 811 (1856) (Campbell, L.J.))). *See also* H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924) ("[C]enturies ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate[.] This jealousy survived for so long that the principle became firmly embedded in the English common law and was adopted with it by the American courts.").

Congress enacted the FAA to "revers[e] centuries of judicial hostility to arbitration agreements," *Scherk*, 417 U.S. at 510-11, and in so doing, "place[d] arbitration agreements 'upon the same footing as other contracts'" as a matter of federal law, *id.* (quoting H.R. Rep. No. 68-96, at 1 (1924)); *see* S. Rep. No. 536, 68th Cong., 1st Sess. (1924); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach To Arbitration: Why This Road Less Traveled Will Make All The Difference On The Issue Of Preemption Under The Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 65 (2005) ("The FAA was enacted as remedial legislation intended to thwart judicial hostility to arbitration and force courts to assess the enforceability of arbitration agreements just as they do all other contractual provisions."). The legislative history of the FAA "establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The House Report accompanying the FAA "makes clear that its purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's

longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds*, 470 U.S. at 219-20.

The 68th Congress also wished to promote arbitration as a cheaper and less adversarial alternative to litigation. "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. Rep. No. 96, at 2. Thus, the FAA also creates a presumption *in favor of* arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24 (1983).

B. Section 2 Of The FAA Preempts State Law That Discriminates Against Arbitration Agreements.

The heart of the FAA is Section 2. Section 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 2 displaces otherwise applicable law by making any written agreement to arbitrate "valid, irrevocable, and

enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added); *see also Perry*, 482 U.S. at 492 n.9. Per the text of Section 2, any state law that serves as a basis for revocation is preempted unless it is applicable to "*any* contract." 9 U.S.C. § 2. As the "*any* contract" limitation connotes, only generally applicable contract defenses that provide a basis for revocation of any contract of any kind survive the reach of preemption under Section 2.[2] Any other state-law requirement that bears on arbitration "must give way." *Perry*, 482 U.S. at 490-491; *see also Doctor's Assocs.*, 517 U.S. at 687 ("Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions.").

Section 2 thus created what is essentially an "equal protection clause" for contract provisions, such that arbitration agreements would be treated at least as well as all other contracts. Stephen A. Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 43 (2006); *see Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004) ("If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 of the Federal Arbitration Act."). In other words, state laws or doctrines that

2. For example, a state-law rule requiring particularized notice (e.g., minimum font size, boldface type) for jury-trial waivers in any contract would fall within Section 2's savings clause because it would be "grounds . . . for the revocation of any contract." 9 U.S.C. § 2.

discriminate against arbitration—under whatever rubric—are preempted by Section 2.

Indeed, this Court has so stated: "By enacting [Section] 2, Congress precluded States from singling out arbitration provisions," *Doctor's Assocs.*, 517 U.S. at 687, and therefore "place[d] arbitration agreements 'upon the same footing as other contracts,'" *Scherk*, 417 U.S. at 510-11 (quoting H.R. Rep. No. 96, at 1). Moreover, the same rules of construction as apply to any contract on any subject must be applied to arbitration agreements. *Perry*, 482 U.S. at 492 n.9. Nor can a state single out a class of contracts for which arbitration is specially disfavored. *Doctor's Assocs.*, 517 U.S. at 687. "[A]ny rule of state law disfavoring or prohibiting arbitration for a class of transactions is preempted[.]" *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003).

When employing state law doctrines of "general applicability," courts thus are not permitted to employ those general doctrines in ways that subject arbitration clauses to disfavored treatment. As one federal appellate court put it, "[t]hat a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA." *Iberia Credit Bureau*, 379 F.3d at 167. "[S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny." *Id.*

II. CALIFORNIA COURTS HAVE DISTORTED THE UNCONSCIONABILITY DOCTRINE TO DISFAVOR ARBITRATION AGREEMENTS.

As explained above, states may not apply laws of general applicability in ways that target arbitration agreements for disfavored treatment. Nor may they designate a particular class of contracts where arbitration clauses are disfavored. Yet that is exactly what California has done. The elements of the unconscionability analysis and the relative burdens of proof in the arbitration setting bear absolutely no relationship to those generally applied to contracts in California. Moreover, these new rules are born of a demonstrable hostility to arbitration—an assumption that arbitration cannot vindicate the public interest to the same extent as judicial class actions. Thus, both the text and the purpose of the FAA are violated by California's "unconscionability" analysis to the same extent as if California had enacted a statute to this effect.

Unconscionability "is nothing new . . . . It has been a part of Anglo-American jurisprudence of contracts for at least three centuries." Howard Hunter, Modern Law of Contracts § 19:39 (rev. ed. 1999). This Court first defined an unconscionable contract as one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 155 (1750)). *Hume* is the starting point for American courts, as "[t]he modern definition of unconscionability comes directly" from the standard it adopted from English common law. Hunter, *supra*, § 19:39.

Generally, unconscionability is broken into two separate elements—procedural and substantive. *See* 8 Richard A. Lord, Williston on Contracts § 18:10 (4th ed. 1998); *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1390 (1996). Substantive unconscionability "focuses on the actual terms of the agreement, while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties." *Am. Software*, 46 Cal. App. 4th at 1390; Lord, *supra*, § 18:10. While courts generally require both substantive and procedural unconscionability in order to find a contract unconscionable, courts have differed over the degree of each element required. While some courts have required "a sufficient showing of both factors in finding a contract unconscionable," *see Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002) (listing cases), other courts, such as California, use a "sliding scale," in which "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz*, 24 Cal. 4th at 114. Like other contractual defenses, the general rule is that "[t]he party asserting unconscionability as a defense has the burden of establishing that condition." *Woodside Homes of Cal., Inc. v. Superior Court*, 107 Cal. App. 4th 723, 727-28 (2003); E. Allen Farnsworth, Farnsworth on Contracts § 4.28 (2d ed. 2001).

A. California Courts Have Distorted Procedural Unconscionability By Labeling Standard Form Contracts Per Se Procedurally Unconscionable In The Arbitration Context.

As per the traditional rule, outside of the arbitration context, California courts generally undertake a multifaceted inquiry into contract formation to determine whether an agreement is procedurally unconscionable. As California courts have recognized, procedural unconscionability "focuses on two factors: 'oppression' and 'surprise.'" *A&M Produce Co. v. FMC Corp.*, 135 Cal App. 3d 473, 486 (1982) (citation omitted); *accord* U.C.C. § 2-302, comment 1 ("The principle is one of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."). Oppression "arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'" *A&M Produce Co.*, 135 Cal. App. 3d at 486 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). Surprise "involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *Id.*

Under these general principles, California courts will not conclude a contract to be procedurally unconscionable simply because it is a so-called "adhesion contract."[3] Instead, procedural unconscionability

3. In truth, standard form retail contracts—although sometimes pejoratively termed "adhesion contracts"—have numerous benefits to businesses and consumers. *See* Randy E.

(Cont'd)

requires an examination of "all the circumstances." *See Walker-Thomas Furniture Co.*, 350 F.2d at 449 ("Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction."); *M.F. Kemper Constr. Co. v. City of L.A.*, 37 Cal. 2d 696, 702-03 (1951) (holding that "under all the circumstances" enforcement of the contract would be unconscionable).

Courts thus will consider, for example, "the experience, intelligence, and education of the parties, their relative bargaining power, the presence or absence of meaningful choice on the part of the weaker party, the conspicuousness and clarity of the contract terms, and other factors." U.C.C. § 2-302, comment; *see also* Restatement (Second) of Contracts § 208, cmt. d (1981)

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Barnett, The Oxford Introduction to U.S. Law: Contracts 105 (2010) ("Most contract law professors and practitioners . . . know that form contracts make the world go round."); *id.* at 105-114 (explaining the commercial advantages of form contracts and why their enforcement is consistent with contractual consent). Even those critical of standard form contracts recognize that this is so. *See, e.g.*, Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 631-32 (1943) ("In so far as the reduction of costs and production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts."); *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1317 n.5 (2005) ("Adhesion contracts are, of course, a familiar part of the modern legal landscape. They are also an inevitable fact of life for all citizens—businessman and consumer alike." (citation and alteration omitted)).

(describing the various "[f]actors which may contribute to a finding of unconscionability in the bargaining process"). *See, e.g., Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 767-68 (1989) ("Also relevant under [procedural unconscionability] is the buyer's sophistication, or lack of same."); *Belton v. Comcast Cable Holdings*, 151 Cal. App. 4th 1224, 1245 (2007) (finding no procedural unconscionability in part because the plaintiff was performing a nonessential recreational activity (listening to music) and so did not lack a meaningful choice).

Applying these principles, California courts have repeatedly held that "[t]he availability of alternative sources from which to obtain the desired service defeats any claim of oppression, because the consumer has a meaningful choice." *Belton*, 151 Cal. App. 4th at 1245. *See also Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 482 (2006) ("There can be no oppression establishing procedural unconscionability, even assuming unequal bargaining power and an adhesion contract, when the customer has meaningful choices."); *Dean Witter Reynolds*, 211 Cal. App. 3d at 768 ("[A]ny claim of 'oppression' may be defeated if the complaining party had reasonably available alternative sources of supply from which to obtain the desired goods or services free of the terms claimed to be unconscionable."); *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1320 (2005) (same); *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 809 (2006) (same). As California has recognized, if all standardized contracts were procedurally unconscionable, then "every form contract not subject

to negotiation between the parties would be deemed oppressive, totally disregarding the undisputed ability of a contracting party to choose to obtain that for which he bargained from other sources." *Dean Witter Reynolds*, 211 Cal. App. 3d at 769; *Morris*, 128 Cal. App. 4th at 1319 ("To describe a contract as adhesive in character is not to indicate its legal effect. A contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise." (citation and alteration omitted)).

Thus, California courts often find standardized form contracts not procedurally unconscionable, at least in non-arbitration cases. For example, in *Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606 (1988), the plaintiff, before riding his motorcycle into a park, signed a "General Release" agreement relieving the park of liability. After the plaintiff was injured, he sought to hold the contract unconscionable. Although "the record show[ed] there was no real negotiation" because "the 'General Release' agreement was preprinted and all users of Indian Dunes Park were required to sign it before using the park," the court found no procedural unconscionability. *Id.* at 613-14. The court noted that "[t]he meaningfulness of a party's choice is based not only on his relationship to the other party but also on his ability to obtain the goods or services which are the subject of the parties' contract from others." *Id.* In *Indian Dunes*, the record did "not show plaintiff had no meaningful choice in deciding to sign the agreement"

because there was "no evidence plaintiff could not have ridden his motorcycle elsewhere without the constraints imposed upon him by defendants." *Id.*; *see also Freeman v. Wal-Mart Stores, Inc.*, 111 Cal. App. 4th 660, 670 (2003) ("[P]laintiff was not subjected to a take-it-or-leave-it situation in which there was no reasonable alternative but to accept the shopping card terms. Plaintiff could simply decline to purchase a shopping card and make purchases by other means."); *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621 (1996) (finding no unconscionability—even though the form waiver provisions in the ski equipment service agreement were industry standard and could not be avoided by taking business elsewhere—because the plaintiff did not need to ski). In other words, California courts generally give standardized form contracts traditional procedural unconscionability analysis and will not find unconscionability if meaningful alternatives exist.

But the "meaningful choice" analysis simply disappears in the arbitration context. California courts will deem an arbitration agreement to be procedurally unconscionable if it is contained in a standardized form contract. As the Ninth Circuit demonstrated below, *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854-55 (9th Cir. 2009), California courts dispense with the traditional procedural unconscionability analysis entirely—spotting an arbitration agreement in a standardized contract is enough. *See, e.g.*, *Aral v. EarthLink, Inc.*, 134 Cal. App. 4th 544, 557 (2005) (describing an adhesion contract containing an arbitration clause as "quintessential procedural unconscionability"); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100 (2002) ("When the weaker party is presented the [arbitration] clause and told to 'take it or leave it' without the opportunity for meaningful

negotiation, oppression, and therefore procedural unconscionability, are present."); *Flores*, 93 Cal. App. 4th at 853 ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability."); *Wilson v. Bally Total Fitness Corp.*, No. D039355, 2003 WL 21398324, at *4 (Cal. Ct. App. June 18, 2003) ("The fact the Agreement is an adhesion contract is sufficient to establish that the Agreement is procedurally unconscionable and there is no need for [the plaintiff] to present evidence showing that she attempted to negotiate the arbitration requirement or other terms of the agreement."); *see also Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571, 593, 597 (2007) (Jones, J., concurring and dissenting) ("I recognize that a number of cases have implied, if not stated outright, that a contract of adhesion is inherently procedurally unconscionable."); Broome, *supra*, at 63 ("[I]n California, in both the employment and the commercial context, adhesive arbitration agreements are procedurally unconscionable per se.").

Worse still, California courts follow this per se rule for arbitration agreements even when they appear to consider the relevant factors. For example, in *Gentry v. Superior Court*, the California Supreme Court found an arbitration agreement in an adhesion contract procedurally unconscionable, even though employees received ample information on arbitration, were *not required* to sign the agreement, and could even opt out within a grace period if they changed their mind after signing. 42 Cal. 4th 443, 471-72 (2007). The Court found this contract procedurally unconscionable because the company "preferred that the employee participate in the arbitration program" and so the employee "felt at

least some pressure not to opt out of the arbitration agreement." *Id.* Additionally, "the lack of material information about the disadvantageous terms of the arbitration agreement" demonstrated that the contract "was, at the very least, not entirely free from procedural unconscionability." *Id. See also Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 784 (9th Cir. 2002) (finding procedural unconscionability even if the employee had "ample time to consider alternatives to [the employer's] terms of employment" and the contract was "written in plain language"); *McManus v. CIBC World Mkts. Corp.*, 109 Cal. App. 4th 76, 91-92 (2003) (finding procedural unconscionability when an agreement to arbitrate was found in a form agreement approved by the SEC and required under the federal and state securities laws).

In sum, California courts are not applying generally applicable procedural unconscionability law to arbitration agreements. *See* Broome, *supra*, at 64-65 (citing cases to demonstrate that "in the non-arbitration context adhesion contracts are frequently held not to be procedurally unconscionable," whereas for arbitration agreements "adhesion alone is enough to satisfy the California courts that the agreement is procedurally unconscionable"). For non-arbitration cases California courts apply their generally applicable law, examining all the circumstances to determine whether there was oppression or surprise. But for arbitration cases they apply a different law—the mere presence of an adhesion contract creates per se procedural unconscionability. This discrimination is prohibited by Section 2 of the FAA.

B. California Courts Apply The Concept Of Substantive Unconscionability In A Manner That Uniquely Disfavors Arbitration Agreements.

1. To Be Substantively Unconscionable, Contract Terms Must "Shock The Conscience."

Because freedom of contract is "regarded as part of the common law heritage," courts generally will hold individuals to their contracts, no matter how "unwise and even foolish" the terms may be. Lord, *supra*, § 18:1; *see also Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1873) ("[I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."); *Transamerica Corp. v. Parrington*, 115 Cal. App. 2d 346, 357 (1953) (same); *Smith v. San Francisco & N.P. Ry. Co.*, 115 Cal. 584, 600 (1897) (same). Accordingly, courts should invalidate an agreement only when "enforcement of the terms of a contract [would be] so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice." Lord, *supra*, § 18:1 (quotation marks omitted).

Substantive unconscionability analysis concerns the terms of the contract. It requires a showing of harsh, one-sided or oppressive terms, *see, e.g., 24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199,

1213 (1998); *Walker-Thomas Furniture Co.*, 350 F.2d at 450, and generally involves an undue appropriation of money or property by the party of superior bargaining power. *See* Restatement (Second) of Contracts § 208, cmt. c (1981) (citing "gross disparity in the values exchanged" as an "important factor in a determination that a contract is unconscionable").

Unreasonableness is not enough. Under the traditional rule—which California courts follow—substantive unconscionability requires contract terms that "shock the conscience." *Cal. Grocers Ass'n v. Bank of Am.*, 22 Cal. App. 4th 205, 214 (1994) ("The traditional standard of unconscionability, as set forth in *Osgood v. Franklin* (1816 N.Y. Ch.) 1 Johns. Ch. 1, 21, is that '. . . the inequality amounting to fraud must be so strong and manifest as to *shock the conscience* . . . .'") (emphasis in original); *Hicks v. Superior Court*, 115 Cal. App. 4th 77, 93 (2004) ("To be substantively unconscionable, a contractual provision must shock the conscience."); *cf.* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & Econ. 293, 294 (1975) (noting that unconscionability should not "allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable"). Indeed, California courts have expressly rejected the lower bar of unreasonableness. *See Morris*, 128 Cal. App. 4th at 1322 ("The phrases 'harsh,' 'oppressive,' and 'shock the conscience' are not synonymous with 'unreasonable.' Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis."); *Am. Software*, 46 Cal. App. 4th at 1391 ("With a concept as nebulous as 'unconscionability' it is

important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.").

Importantly, unconscionability is determined "at the moment when [the contract] is entered into by both parties—not . . . in light of subsequent events," *Am. Software*, 46 Cal. App. 4th at 1391; *see also* Cal. Civ. § 1670.5(a), and so California courts will not invalidate a contract "'merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated.'" *Morris*, 128 Cal. App. 4th at 1324 (quoting *Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 576 (8th Cir. 1975)). Finally, "[t]he party asserting unconscionability as a defense has the burden of establishing that condition." *Woodside Homes*, 107 Cal. App. 4th at 727-28.

2. In The Arbitration Context, California Courts Have Abandoned The "Shock-The-Conscience" Standard In Favor Of A Mutuality Test.

California courts have abandoned the traditional "shock-the-conscience" standard for substantive unconscionability in the arbitration context. Instead, they have devised a test for substantive unconscionability that is unique to arbitration. They examine whether the arbitration clause is "one-sided" by determining whether there is a lack of "mutuality" of obligation under the arbitration agreement. *See Discover Bank*, 36 Cal. 4th at 161; *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1176 (9th

Cir. 2003); *Szetela*, 97 Cal. App. 4th at 1100-01; *Armendariz*, 24 Cal. 4th at 117-18; *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1538-40 (1997).

Initially, the mutuality test required equality of obligation as to both parties to an arbitration clause, *i.e.*, that both parties agreed to be bound by arbitration. *See Stirlen*, 51 Cal. App. 4th at 1538. Without bilaterality of obligation, an arbitration clause would be presumed substantively unconscionable. *See Armendariz*, 24 Cal. 4th at 117-18. This strict mutuality is not required for other terms of a contract. Indeed, it is black letter law that, as long as the contract as a whole is supported by adequate consideration, there need not be mutuality in each individual term. *See* Lord, *supra*, § 7:14 (emphasizing that it is "imperative" to understand that "no requirement of mutuality exists so long as the requirement of consideration is met") (citing Restatement (Second) of Contracts § 79(c) (1981)).

The *Stirlen* court grounded this mutuality principle on its assumption that arbitration is an inferior mechanism for adjudicating claims. While acknowledging that "it may often be advantageous for employees to submit employment disputes to arbitration," the court struck down an arbitration clause that bound only the employee, not the employer, to arbitration. *Stirlen*, 51 Cal. App. 4th at 1537. The court emphasized that arbitration procedures are "disadvantageous" and, indeed, "inferior" in a number of ways, including that "arbitral discovery is ordinarily much more limited than judicial discovery, which may seriously compromise an employee's ability to prove discrimination or unfair treatment" and because "parties who submit a dispute

to private arbitration also give up their right to review of an adverse decision." *Id.* at 1537-38.

Other California courts soon extended this newly crafted mutuality requirement to arbitration clauses in consumer contracts. *See, e.g., Flores*, 93 Cal. App. 4th at 858 (loan agreement); *Torigian v. Michael Cadillac, Inc.*, No. F039900, 2003 WL 21246609, at *5 (Cal. Ct. App. May 29, 2003) (automobile sales contract). Moreover, subsequent cases extended this mutuality requirement even further, invalidating arbitration clauses that bound both parties to arbitration if, in the court's predictive judgment, the agreement to arbitrate would apply in only one direction in practice. *See Ingle*, 328 F.3d at 1173-74 (disregarding the fact that both parties were subject to the same terms, stating: "[b]ecause the possibility that Circuit City would initiate an action against one of its employees is so remote, the lucre of the arbitration agreement flows one way: the employee relinquishes rights while the employer generally reaps the benefits of arbitrating its employment disputes.").

This "in practice" rationale was applied to agreements requiring individual arbitration in *Discover Bank*. There, the California Supreme Court extended its mutuality test to find class arbitration waivers "indisputably one-sided," noting that "[a]lthough styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not

sue their customers in class action lawsuits." *Discover Bank*, 36 Cal. 4th at 161 (citation omitted). Subsequent cases have relied on this reasoning to hold similar arbitration agreements presumptively one-sided. *See, e.g.*, *Gentry*, 42 Cal. 4th at 454 ("[C]lass action or arbitration waivers are indisputably one-sided."). More particularly, in striking down class arbitration waivers, California courts have reasoned that this "practical" or *de facto* lack of mutuality allows businesses to employ class arbitration waivers as weapons. That is, the "one-sided" nature of a class arbitration waiver permits it to be utilized as an "exculpatory" clause that enables a business to "carr[y] out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 36 Cal. 4th at 163.

3. The Mutuality Test Bears No Resemblance To The Traditional "Shock-The-Conscience" Standard.

California's "mutuality test" departs fundamentally from its traditional substantive unconscionability analysis in three ways. First, California courts have expressly rejected this concept of mutuality outside of the arbitration context. *See Principal Life Mut. Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1489 (1988) (holding mortgage agreement provision enforceable despite unilateral nature and noting that "where sufficient consideration is present, mutuality is not essential"); *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 752 (1984) (holding employment contract enforceable despite unilateral nature if consideration requirement is properly met and noting that "mutuality of obligation" is unnecessary).

Second, the mutuality requirement is a sharp break from the "shock-the-conscience" standard. This standard requires an examination of the *entire contract*—not just particular terms through the mutuality test. *See Oblix*, 374 F.3d at 492 ("That Oblix did not promise to arbitrate all of its potential claims is neither here nor there. . . . [A]rbitration was as much a part of this deal as Winiecki's salary and commissions, the rules about handling trade secrets, and other terms. All stand or fall together.").

Mutuality requires no inquiry into the harshness of the clause or contract; it simply presumes substantive unconscionability from a "one-sided" promise and then reverses the traditional presumption onto the party seeking to enforce the agreement to arbitrate as written. *Compare Ingle*, 328 F.3d at 1174 ("Unless the employer can demonstrate that the effect of a contract to arbitrate is bilateral—as is required under California law—with respect to a particular employee, courts should presume such contracts substantively unconscionable.") (citing, among others, *Stirlen* and *Armendariz*), *with Woodside Homes*, 107 Cal. App. 4th at 727-38 ("The party asserting unconscionability as a defense has the burden of establishing that condition.").

Finally, mutuality is based on the assumption that arbitration is inferior to judicial proceedings as an adjudicatory process and that it is incapable of vindicating substantive rights. But the Court has barred this assumption of inferiority from serving as a basis for refusing to enforce an agreement to arbitrate. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) ("At bottom, objections centered on the nature

of arbitration do not offer a credible basis for discrediting the choice of that forum."). Moreover, the Court has emphasized that an agreement to arbitrate, i.e., to adopt certain adjudicatory *procedures*, does not affect underlying *substantive* rights. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum."); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).[4]

This distortion of the applicable standard is not merely an academic matter. It translates into a real and demonstrable difference in outcome. An empirical study of judicial decisions from California's intermediate courts of appeal over a 24-year period reveals the disparity with regard to unconscionability challenges as between arbitration agreements and all other contracts. "[U]nconscionability challenges succeeded in about fifty-eight percent of cases in the arbitration context. In the non arbitration context, by contrast, unconscionability challenges succeeded only eleven percent of the time." Broome, *supra*, at 48.

California courts' hostility to arbitration is further illustrated by example. *Woodside Homes* involved the application of unconscionability doctrine to a "judicial reference clause" in a standard form contract, which "required consumer homebuyers who sue the builder

4. This application of substantive unconscionability to procedural rights is another deviation from traditional contract law principles of the California courts.

to submit the dispute to binding judicial reference." 107 Cal. App. 4th at 727-28. The plaintiffs argued that several features of the judicial reference clause were unconscionable, including the fact that the building company could opt-out of judicial reference; the referee need not be a judge; the parties waived their right to a jury; the decision was to be confidential; the parties would share the costs and the referee's fees; and each party would be responsible for its own attorney's fees. *Id.* at 37.

The *Woodside Homes* court felt obliged to note that it was not dealing with an arbitration case: "we must point out that this is not an arbitration case, and therefore not all authorities dealing with arbitration agreements are directly relevant." *Id.* at 38. The court then proceeded to uphold the judicial reference clause. The court found no problem with the opt-out provision (despite its rendering of the judicial reference clause non-mutual) or the other challenged provisions, concluding that "none of these is of substantial weight." *Id.* at 41. The court explained that "a provision which favors one side is not substantively unconscionable if the advantage is completely collateral to the issues surrounding a fair resolution of the dispute." *Id.* at 42 n.11. On the other hand, California courts have held similar provisions in arbitration agreements to be unconscionable. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) (applying California law and holding a provision splitting arbitrator fees unconscionable); *id.* at 1152 (finding a "confidentiality provision" unconscionable).

This distortion of unconscionability law has not been lost on commentators or courts. *See* McGuinness, *supra*, at 78 ("California courts—and the Ninth Circuit—have changed the unconscionability doctrine to strike down arbitration agreements."); Broome, *supra*, at 39 ("Although ostensibly applying the 'generally applicable' contract defense of unconscionability, in cases involving the validity of arbitration agreements the California courts routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration."). In fact, *California courts themselves have recognized the discrimination. Gray v. Conseco, Inc.*, No. 00-CV-322, 2000 WL 1480273, at *4 (C.D. Cal. Sept. 29, 2000) ("Under California law, other non-mutual contract provisions are valid and not unconscionable. The language used by the California Supreme Court in the *Armendariz* opinion itself demonstrates that the rule singles out and imposes a special burden on arbitration agreements . . . ." (citation omitted)).

The exculpatory clause rationale—which is a particular manifestation of the mutuality requirements in the context of a class arbitration waiver, *see supra* section II.B.2—applies only after "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 36 Cal. 4th at 162-63. But this is not a proper application of unconscionability doctrine, as substantive unconscionability has always been determined *at the time of contracting*, *see, e.g.*, *Walker-Thomas Furniture Co.*, 350 F.2d at 448 ("[A] court may refuse to enforce a contract which it finds to be unconscionable *at the time it was made*.") (emphasis

added), even under the California Civil Code, *see* Cal. Civ. § 1670.5(a) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable *at the time it was made* the court may refuse to enforce the contract.") (emphasis added). That it is *later* alleged that a party carried out a "scheme to deliberately cheat large numbers of consumers out of individually small sums of money" is irrelevant to the analysis. *See, e.g.*, *Am. Software*, 46 Cal. App. 4th at 1392 (holding not unconscionable an employment contract that terminated the employee's right to receive commissions on payments received on her accounts 30 days after severance of employment, even though she allegedly lost approximately $30,000 in unpaid commissions).

In any case, the interests of third parties are irrelevant. Unconscionability concerns only the parties to the agreement, no one else. *See Reibold v. Simon Aerials, Inc.*, 859 F.Supp. 193, 199 (E.D. Va. 1994) ("[W]hether any agreement is unconscionable or not can only be examined with reference to the original parties to the bargain."); *Lynwood Redevelopment Agency v. Angeles Field Partners, LLC*, No. B210165, 2009 WL 4690213, at *8 (Cal. Ct. App. Dec. 10, 2009) ("Respondent has not directed our attention to any statute or case authorizing application of the doctrine of unconscionability for the benefit of nonparties to the contract.").

Perhaps more importantly, the exculpatory clause rationale, like the mutuality test to which it relates, is based upon the twin prohibited assumptions that arbitration is an inferior procedure for vindicating

claims and that it thus forecloses substantive rights. As this Court has emphasized, "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate." *14 Penn Plaza LLC*, 129 S. Ct. at 1471.[5] "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628.[6]

Finally, the exculpatory clause rationale suffers from a flawed premise—that the alleged inability of consumers to pursue low-value claims will result in companies escaping liability and undermine general deterrence. This theory neglects the fact that state attorneys general, *see, e.g.*, Cal. Bus. & Prof. §§ 17204, 17206 (authorizing the California Attorney General to enforce state consumer protection law through civil penalties and injunctive relief), and appropriate federal agencies have oversight over sellers of consumer products, *see, e.g.*, *Gilmer*, 500 U.S. at 32 ("[I]t should be remembered that

5. Bilateral arbitration in fact yields demonstrable benefits for both consumers and businesses. *See* Chamber of Commerce Amicus Curiae Brief in Support of Petition for Certiorari at 6-16.

6. Because arbitration does not expunge substantive rights, California courts' reliance on California Civil Code section 1668 in invalidating arbitration clauses is misplaced. *See* Cal. Civ. § 1668 ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.").

arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.").

III. CALIFORNIA'S DISTORTION OF UNCONSCIONABILITY LAW TO STRIKE DOWN ARBITRATION CLAUSES IS PREEMPTED UNDER THE FAA.

California courts' distortion of state unconscionability law to uniquely disfavor arbitration agreements is preempted by Section 2 of the FAA. *See Perry*, 482 U.S. at 492 n.9 ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2]."). The FAA simply does not permit states to "singl[e] out arbitration provisions for disfavored treatment." *Doctor's Assocs.*, 517 U.S. at 687;[7] *see, e.g., Enderlin v. XM Satellite Radio*

7. There is a strong argument that the reference in the savings clause to "revocation" applies only to defects in the formation of contracts (procedural defects affecting offer and acceptance) rather than substantive "public policy." Congress used three terms to describe the status of arbitration agreements under federal law: "valid, irrevocable, and enforceable." 9 U.S.C § 2. Each of these terms must be assigned a distinct meaning. *See Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15 (1985). Moreover, Congress's use of the noun "revocation" in the same sentence as its adjectival antonym "irrevocable" further evidences that the latter term must be given a different meaning than "valid" and "enforceable." This textual argument is reinforced by the language of Section 4, indicating that upon being satisfied "that the making of the agreement for arbitration . . . is not at issue" a court should order arbitration. *See, e.g., Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) ("[T]he language (Cont'd)

Holdings, Inc., No. 06-CV-0032, 2008 WL 830262, at *10 (E.D. Ark. Mar. 25, 2008) ("The Court agrees with Defendants' contention that Arkansas law requiring mutuality within the arbitration paragraph itself is preempted by the FAA because it places the arbitration clause on unequal footing with other contract terms that do not each have to be mutual.").

Nor can California hide this distortion by dressing it in the garb of general unconscionability law. It is no less a violation of the FAA that California courts purport to apply its general law. For the FAA forbids states from doing covertly what they are prohibited from doing overtly. *See Iberia Credit Bureau*, 379 F.3d at 167 ("[S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.").

(Cont'd)

of § 2 (which speaks to revocation . . .), especially when read in conjunction with § 4 . . . , indicates that Congress created an exception to the general rule (that an arbitration clause will be enforced by its terms) only when there is a flaw in the formation of the agreement to arbitrate."). This reading of the statute also accords with the understanding of the concept of "revocation" at the time of the adoption of the FAA, which was short hand for formation defects, not public policy objections to contracts. *See* Wesley A. Sturges, A Treatise on Commercial Arbitrations & Awards § 15(1)-(2) (1930) ("An agreement of this character induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure might well be . . . disregarded . . . . But [otherwise], it is not easy to assign at this day any good reason why the contract should not stand[.]") Petitioner supplies additional support for this argument in New York law at the time of the adoption of the FAA. *See* AT&T Br. at 41 & n.12.

Thus, the Ninth Circuit's application of the unconscionability doctrine to void AT&T Mobility's arbitration clause violates the FAA. This new doctrine—which just happens to be labeled "unconscionability"—has no roots in the common law and does not apply to "any contract." It violates both the plain text and the purpose of the FAA, and thus is preempted. *Oblix*, 374 F.3d at 492 ("[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.").

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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AT&T MOBILITY, LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—when national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership, their clientele, and to the judicial system as a whole. Based on its members' extensive practical experience, DRI is uniquely qualified to explain to the Court why the decision below distorts generally applicable contract law, creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements that benefit customers and businesses alike, and generally conflicts with the liberal federal policy favoring arbitration. In addition, DRI desires to explain why, in its members' experience, class actions are fundamentally incompatible with arbitration and its benefits.

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[1] No counsel for a party authored any part of this brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

As AT&T Mobility ("AT&T") explains in its brief, the Ninth Circuit's decision conflicts with the Federal Arbitration Act ("FAA") in every way imaginable: by requiring specific arbitral procedures as a precondition to the enforcement of arbitration agreements; by invoking a novel brand of unconscionability devised specifically to invalidate arbitration agreements; and by creating powerful disincentives to use consumer arbitration agreements. This *amicus* brief aims to do two things: first, to provide additional detail as to precisely how the decision below impermissibly distorts generally applicable contract law; and, second, to outline additional ways in which the decision conflicts with the FAA.

1. The Ninth Circuit's decision contravenes the FAA by invoking a version of "unconscionability" that departs dramatically from the doctrine applied to contracts generally. Traditional unconscionability doctrine requires a limited review of the fairness of the parties' contract, viewed *ex ante* (*i.e.*, at the time the contract was made) and taking into account all of the contract's provisions. The decision below, in contrast, relies on broad notions of public policy, applied from an *ex post* perspective (*i.e.*, at the time of litigation) and focusing exclusively on the effect of a single term of the parties' arbitration agreement, while ignoring the benefits the agreement offers to customers. This novel "unconscionability" analysis violates the FAA by singling out arbitration agreements for special scrutiny.

2. The Ninth Circuit's decision conflicts with the FAA in several additional ways.

a. The practical effect of the decision below is to impose a realistically impossible burden on a party seeking to enforce an arbitration agreement: to *disprove* the supposed need for the "deterrent effect" of a class action. This novel, insurmountable burden is fundamentally inconsistent with the FAA.

b. As this Court recognized last Term in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), class-wide procedures are inherently incompatible with the traditional advantages and essential features of arbitration. California's insistence on class-wide arbitral procedures that destroy the benefits of arbitration is but another effort to "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001).

c. By making the enforceability of arbitration agreements highly unpredictable from jurisdiction to jurisdiction, the Ninth Circuit's decision also conflicts with Congress's goal of "mak[ing] arbitration agreements universally enforceable" (*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 279 (1995))—and *not* "dependent for [their] enforcement on the particular forum in which [the right to arbitrate] is asserted" (*Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984)).

d. Finally, by adopting what amounts to a *per se* rule against consumer agreements that require individual arbitration, the decision below conflicts with the liberal federal policy favoring arbitration agreements, which, as this Court has recognized, applies with full force in the consumer context.

ARGUMENT

I. The Ninth Circuit's Decision Contravenes The FAA By Distorting Traditional, Generally Applicable Contract Law.

"The FAA's displacement of conflicting state law is now well-established, and has been repeatedly reaffirmed." *Preston v. Ferrer*, 552 U.S. 346, 352 (2008) (quotation marks, citation omitted). Among its well-established preemptive principles is that while "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to ... arbitration agreements" (*Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)), they may not be applied in ways that differ from the manner in which they are applied to contracts generally. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). That is, "courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 359 F.3d 159, 167 (5th Cir. 2004).

The decision below violates this principle by invoking a novel version of "unconscionability" that bears little resemblance to the traditional, generally applicable doctrine. Traditional unconscionability doctrine (1) focuses on the relative fairness of the obligations exchanged by the parties, serving as a narrow defense only to contracts that are truly "harsh," "oppressive," or "conscience-shocking"; (2) evaluates the contract at the time it was made (*i.e.*, *ex ante*), taking into account the range of possible outcomes; and (3) judges the contract as a whole, denying enforcement only to contracts that involve an overall "gross disparity" of values exchanged.

The decision below, in contrast, (1) relies on expansive notions of public policy to invalidate an arbitration agreement "that a reasonable consumer may well prefer"; (2) proceeds from an *ex post* perspective, focusing exclusively on a circumstance that will rarely come to pass; and, (3) operating in a vacuum, fixates on a single term of the arbitration agreement, ignoring the significant benefits the agreement confers on AT&T's customers. In short, the Ninth Circuit applied the unconscionability doctrine in name only, in a manner that subverts the FAA and this Court's precedents.

A. The Ninth Circuit's Analysis Departs From Traditional Unconscionability Doctrine, Which Is Narrow And Bargain-Focused.

"Unconscionability is a narrow doctrine[.]" *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 305 (4th Cir. 2001). "Traditionally"—and to this day—"a bargain was said to be unconscionable" only "if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" RESTATEMENT (SECOND) OF CONTRACTS (1981) § 208 cmt. b (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (1750));[2] *see also, e.g.*, Dando B. Cellini & Barry L. Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 196 (1967) (explaining that modern unconscionability, as re-

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[2] *Accord, e.g., Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. 2009); *Stinger v. Chase Bank, USA, NA*, 265 F. App'x 224, 228 (5th Cir. 2008); *Gay v. CreditInform*, 511 F.3d 369, 391 (3d Cir. 2007).

flected by the Uniform Commercial Code, "draws on a long history of common-law development"). Stated differently, a contract is unconscionable only if it is "so unfair as to shock the conscience of the court." 1 E. ALLEN FARNSWORTH, CONTRACTS § 4.27 (4th ed. 2004).

An agreement has never been thought "unconscionable" merely because unequal "bargaining power" produced an uneven "allocation of risks." UNIFORM COMMERCIAL CODE ("U.C.C.") § 2-302 cmt.1 (1995); *accord* RESTATEMENT, *supra*, § 208 cmt.d (1981). Nor will the doctrine relieve a party of "a simple old-fashioned bad bargain." *Wille v. Sw. Bell Tel. Co.*, 549 P.2d 903, 907 (Kan. 1976); *accord* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:1 (4th ed. 1998). Unconscionability has thus been described as an "infrequently used" "safety valve" for relief from a contract so one-sided "'that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice.'" *Steinhardt v. Rudolph*, 422 So.2d 884, 890 (Fla. Dist. Ct. App. 1982) (quoting 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1632 (3d ed. 1972)). Precisely because it is intended as a narrow defense to only the most unfair contracts, "it is well-known that unconscionability is generally a loser of an argument." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1442 (2008); *accord* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.4 (rev. ed. 2002) ("Most claims of unconscionability fail.").

Traditional unconscionability doctrine "looks to the oppressiveness or one-sided nature of the transaction," evaluating the substantive fairness of the obligations and

burdens that the contract imposes on "one party or ... the other," *i.e.*, the actual parties to the contract and before the court. Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 473 (1995). That is, it is a focused assessment of the contract itself,[3] *not* a wide-ranging public policy inquiry. *See, e.g.*, J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1760 (2006) ("unconscionability" is "a doctrine that evaluates an individual contract's fairness"). Indeed, a California appellate court recently stated that it was unaware of "any statute or case authorizing application of the doctrine of unconscionability for the benefit of nonparties to the contract." *Lynwood Redevelopment Agency v. Angeles Field Partners, LLC*, 2009 WL 4690213, at *8 (Cal. Ct. App. Dec. 10, 2009) (unpublished/non-precedential op.).

The Ninth Circuit's analysis bears no resemblance to this narrow doctrine. Rather than testing the fairness of the contract of the parties actually before the court, the court relied on California's supposed public "policy ... of deterring and redressing wrongdoing" through class-action litigation. Pet. App. 5a. And rather than applying any of the traditional measures of unconscionability, the court applied a unique "test" that inevitably requires the

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[3] *See, e.g.*, *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1390 (1996) ("Substantive unconscionability focuses on the actual terms of the agreement...."); *Lovey v. Regence BlueShield of Id.*, 72 P.3d 877, 882 (Idaho 2003) ("substantive unconscionability focuses upon the terms of the agreement itself"); *Knight Adjustment Bur. v. Lewis*, 228 P.3d 754, 757 (Utah App. 2010) ("substantive unconscionability focuses on the terms of the agreement, examining the relative fairness of the obligations assumed" (quotation marks omitted)).

invalidation of any consumer agreement to arbitrate on an individual basis. *Id.* at 7a. Under this "test," a consumer need only file a putative class action *alleging* that the defendant "has carried out a scheme deliberately to cheat" its customers, and her arbitration agreement automatically is rendered unconscionable. This perfunctory "test" requires invalidation of the arbitration agreement no matter what else the plaintiff has received as part of the bargain and no matter what advantages and incentives the arbitration agreement provides. *See id.* at 7a-11a.

The decision below is thus plainly inconsistent with traditional unconscionability doctrine because the court's "test" has nothing to do with the basic fairness of the agreement between AT&T and the Concepcions. Indeed, Judge Bea, the author of the Ninth Circuit's opinion, stated that he understood California law to include "a bizarre component to it that no matter how conscionable to the individual [an arbitration agreement is], the public policy of California is to use class actions." Oral Argument Tr., *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), at 7:55, *at* http://www.ca9.uscourts.gov/datastore/media/2009/09/17/08 56394.wma. The only facts that matter are (1) that the agreement requires arbitration on an individual basis and (2) that the Concepcions alleged widespread fraud. Indeed, the Ninth Circuit effectively acknowledged that the agreement is fair to the Concepcions in that it "essentially guarantee[s] that [AT&T] will make any aggrieved customer whole who files a claim"—which, undeniably, is "a good thing." Pet. App. 11a n.9. This sort of make-whole guarantee, however, is not enough to render the arbitration agreement enforceable under California law, because other parties *not before the court* may choose not to file similar

claims. *Id.* This sort of concern, which has nothing to do with the Concepcions' ability to pursue their own claims or "the actual terms of the agreement" (*Ali*, 46 Cal. App. 4th at 1390), has no basis in traditional unconscionability doctrine (*Lynwood Redevelopment Agency*, 2009 WL 4690213, at *8); it has been created out of whole cloth to invalidate arbitration agreements.

Applying a test lacking any foundation in generally applicable contract law, the Ninth Circuit, unsurprisingly, reached a result fundamentally at odds with existing doctrine. As noted, it has long been the case that a contract is considered "unconscionable" only if it is so unfair and one-sided that it "shocks the conscience"--or that only a "man ... under delusion would make" it. A contract that provides aggrieved customers with a make-whole guarantee (Pet. App. 11a n.9) and "that a reasonable consumer may well prefer" (*id.* at 42a) does not even remotely approach this exacting standard.

B. The Ninth Circuit's Analysis Departs From Traditional Unconscionability Doctrine, Which Requires An Assessment Of The Contract's Fairness At The Time It Was Made, Not Second-Guessing At The Time Of Litigation.

It is well-settled that the relevant question under traditional unconscionability doctrine is whether the contract was "unconscionable *at the time the contract [was] made*." RESTATEMENT, *supra*, § 208 (emphasis added); *accord, e.g.*, U.C.C. § 2-302(1); *Williams v. Walker-Thomas Furniture*, 350 F.2d 445, 449 (D.C. Cir. 1965) (Wright, J.) ("[T]he primary concern must be with the terms of the contract considered in light of the circums-

tances existing when the contract was made."). Because "the critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties," "[u]nconscionability cannot be demonstrated by hindsight." *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985). Thus, "[i]t is clear that a proper application of the unconscionability doctrine involves an assessment of the contract *ex ante*, rather than *ex post*. In other words, a court should assess the 'values exchanged' as of the time the contract was formed, rather than as of a later time, such as, the time of a dispute." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. L. 251, 267-68 (2006); *accord, e.g.*, LORD, *supra*, § 18:12.

The *ex ante* focus is eminently sensible. Contracts typically govern a range of potential events, many of which are unlikely to occur. "To judge the substantive fairness of contracts at a date subsequent to their making could nullify many contracts entailing a speculative element." *Resource Mgmt. Co.*, 706 P.2d 1043. To illustrate this principle, Professor Farnsworth cites a Missouri Supreme Court case holding that an ailing woman's promise to devise a farm valued at $34,400 in return for care during the remainder of her life was not unconscionable even though she died just one month later, so that the value of the services rendered amounted to just one percent of the value of the farm. *Tuckwiller v. Tuckwiller*, 413 S.W.2d 274, 278-79 (Mo. 1967), *cited in* 1 FARNSWORTH, *supra*, § 4.27, at 573 n.3. As that court explained, "in determining whether or not a contract ... is unconscionable ..., the transaction must be viewed prospectively, not retrospectively." 413 S.W.2d at 278.

Therefore, the relevant question was whether, at the time the contract was made, a promise to provide care for an indefinite period of time—possibly for years—in exchange for the farm was conscience-shocking, and the court properly held that it was not. *See id.* at 278-79.

Thus, a contract cannot be condemned as unconscionable simply because, post-formation, a situation arises in which its provisions disadvantage one side or the other. To do so would ignore that when the contract was made, a variety of outcomes was possible, some more or less likely to occur, some more or less advantageous to the respective parties, etc. This principle matters here because, at the time of contracting, the likely outcome is that no disputes will arise between the customer and AT&T that require arbitration or litigation. In that situation, the arbitration provision is unambiguously mutually beneficial: AT&T benefits from lower dispute-resolution costs, and the customer benefits from the lower prices of goods and services that necessarily result.[4] The customer further benefits because, to the extent that any minor disputes arise, the arbitration provision's

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[4] "[W]hatever lowers costs to businesses tends over time to lower prices to consumers.... [T]he size of the price reduction caused by enforcement of consumer arbitration agreements will vary.... But it is inconsistent with basic economics to question the existence of the price reduction." Ware, *supra*, at 255-56. In an analogous context, this Court has recognized that customers' whose contracts include a forum-selection clause "benefit in the form of reduced [prices] reflecting the savings that [a company] enjoys by limiting the fora in which it may be sued." *Carnival Cruise Line, Inc. v. Shute*, 499 U.S. 485, 594 (1991); *see also, e.g., Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) ("arbitration offers cost-saving benefits to telecommunication providers and these benefits are reflected in a lower cost of doing business that in competition are passed along to customers" (quotation marks omitted)).

"Premium" creates a strong incentive for AT&T to resolve the dispute informally. *See* Pet. App. 42a; Pet.'s Br. 5 8.

It is also apparent that the customer benefits from the arbitration provision if a dispute arises that is not resolved informally and is not appropriate for class treatment. In addition to paying reduced prices for goods and services, the customer will then be entitled to pursue arbitration at no cost with a potential recovery of a contractual "Premium" and double attorneys' fees. Indeed, for a small claim not appropriate for class treatment, the arbitration provision may affirmatively provide the only viable mechanism for the customer to pursue her claim. As this Court has recognized, "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

The only scenario in which there is even a question about the fairness of the arbitration provision is the relatively rare instance in which a dispute actually arises that is litigable on a classwide basis. But the overwhelming majority of disputes are *not* appropriate for class treatment. For example, in a Federal Judicial Center study of nearly 300 cases filed as putative class actions, a class was certified in only about 20% of the cases.[5] And

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[5] Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 634-35 (2006); *see also* Administrative Office of the California Courts, *Class Certification in California*, at A1, tbl.A-1 (Feb. 2010) (finding that a class was certified in only 22.3% of 1,294 putative class actions terminated in California state court from 2000 to 2005), *available at* http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf.

that study, of course, consisted only of cases in which the plaintiff's attorney concluded that there were non-frivolous grounds for pursuing class certification; it does not reflect the much larger universe of cases in which class status is never sought because the dispute obviously is not appropriate for class treatment. Thus, the one scenario on which the decision below fixates is, by far, the least likely actually to occur under the contract. And even in that rare scenario, the substantive fairness of the provision is debatable; as the district court concluded, "a reasonable consumer" with a claim litigable as a class action still "may well prefer" AT&T's arbitration provision. Pet. App. 42a.[6]

Under traditional unconscionability doctrine, when there is reasonable debate as to a contract's fairness, it cannot be condemned as conscience-shocking. *See* Part I.A, *supra*. Even more clearly, adopting the *ex ante* perspective that is an indispensable feature of the doctrine, a contract cannot be deemed unconscionable when (1) it unambiguously benefits the complaining party in

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[6] As the district court explained, even certified class actions often settle for "pennies on the dollar with few consumers actually submitting claims" (Pet. App. 42a), and Congress has found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed" (Class Action Fairness Act ("CAFA"), Pub. L. 109-2, § 2(a)(3), Feb. 18, 2005). On the other side of the ledger, a recent study by the Searle Civil Justice Institute at Northwestern University School of Law found that AAA consumer arbitration is inexpensive and expeditious for consumers; in addition, consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255. *See Consumer Arbitration Before the American Arbitration Association; Preliminary Report*, at xi-xv (Mar. 2009), *available at* http://www.searlearbitration.org/p/full_report.pdf.

the *most likely* outcomes under the contract, and (2) its fairness is debatable only with respect to the *least likely* outcome under the contract.

The decision below reaches a result irreconcilable with generally applicable contract law by improperly adopting an *ex post*, rather than an *ex ante*, view of the contract. Nowhere does the court's opinion acknowledge the benefits to customers who never have a dispute with the company. And only in a footnote does the court grudgingly concede that customers who pursue individual claims are virtually guaranteed to be made whole. Pet. App. 11a n.9. But the clearest evidence of the court's *ex post* approach is its reliance on the customer's underlying allegations that the company engaged in a broad "scheme deliberately to cheat" customers. Pet. App. 7a. For the reasons discussed above, under traditional unconscionability doctrine, the enforceability of a contract cannot possibly depend on the nature of allegations and claims made by a party months or even years after the contract was made. It is nonsensical to say (1) that a contract was "unconscionable *at the time [it was] made*" (RESTATEMENT, *supra*, § 208 (emphasis added)), because, *after the contract was made*, one of the parties alleged widespread fraud—but (2) the same contract was not unconscionable *at the time it was made* because, *after it was made*, only individualized grievances were raised. A contract is either unconscionable at its making or it is not. The nature of a party's allegations in a dispute arising after the contract's formation have nothing to do with "the circumstances existing when the contract was made"—and, thus, nothing to do with unconscionability properly understood. *Williams*, 350 F.2d at 449.

C. The Ninth Circuit's Analysis Departs From Traditional Unconscionability Doctrine, Which Requires Consideration Of The Entire Contract, Not A Blinkered Focus On A Single Term.

Under traditional unconscionability doctrine, a court will refuse to enforce a contract only if "*the sum total of its provisions* drives too hard a bargain for a court of conscience to assist." *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 84 (3d Cir. 1948) (emphasis added).[7] Therefore, "[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into ... the fairness of the contract as a whole." *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 750 (W. Va. 1986); *see also, e.g.*, RESTATEMENT, *supra*, § 208 cmt.c ("gross disparity in values exchanged may be an important factor in a determination that a contract is unconscionable").[8] The Ninth Circuit's analysis fails to comport with this well-settled principle of unconscionability. This particular distortion of the traditional doctrine overlaps to a large degree with those already discussed and provides further confirmation that the decision runs afoul of the FAA.

Rather than analyzing the fairness of the contract as a whole, or assessing whether there was any overall im-

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[7] The classic *Campbell Soup* case is cited both by the RESTATEMENT, *supra*, § 208 cmt.b & Reporter's Note, and by the U.C.C. § 2-302 cmt.1. *Accord, e.g., Waters v. Min Ltd.*, 587 N.E.2d 231, 232-34 (Mass. 1992).

[8] This Court has made a similar point under the FAA: "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281.

balance in values exchanged, the Ninth Circuit focused *exclusively* on the class waiver in the parties' arbitration agreement. Pet. App. 7a-9a. Before it mentioned any other feature of the agreement, the court had already checked each box of its special "test" focused solely on the class waiver and declared the arbitration agreement "unconscionable under California law." *Id.* at 9a. Later in its opinion, the court did acknowledge the agreement's pro-consumer features—but only to explain why those features made no difference under the court's novel unconscionability analysis. *See id.* at 9a-11a. Indeed, in a footnote, the court dismissed as *irrelevant* under California law the fact that the arbitration provision virtually guarantees that any aggrieved customer will be made whole. *See id.* at 11a n.9. And, as noted above, the opinion contains no acknowledgment of the lower prices that necessarily result from a company's reduced litigation costs. *See supra* note 4.

As one commentator explained, even when a relatively "low-quality" (*i.e.*, one-sided) arbitration provision is challenged, the "fail[ure] to consider offsetting benefits to buyers in the form of lower prices" is a "glaring flaw in [a court's] substantive unconscionability" analysis. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1273-74 (2003). This distorted application of the unconscionability doctrine is exemplified by the decision below: It "focus[es] on the utility of the [allegedly] low-quality term to the litigating buyer ex post." *Id.* at 1274. A proper application of traditional unconscionability doctrine, in contrast, must compare "the utility of the *entire contract* to buyers ex ante" to a hypothetical contract that lacks the allegedly unconscionable term but charges a higher price. *Id.* (emphasis added). The dis-

torting effect of a blinkered focus on a single term is compounded when, as in this case, the arbitration provision cannot fairly be characterized as "low-quality," and its "offsetting benefits to buyers" include not only "lower prices" but also features of the arbitration provision that are designed to, and do, make individual arbitration a viable dispute-resolution mechanism. *See* Pet.'s Br. 5-8. Put simply, the Ninth Circuit's refusal to consider these offsetting benefits cannot be squared with the unconscionability doctrine applicable to contracts generally.

II. The Ninth Circuit's Analysis Conflicts With The FAA's Pro-Arbitration Policy.

A. California Law Creates Insurmountable Obstacles To The Enforcement Of Arbitration Agreements.

As the district court explained, the innovative features of AT&T's arbitration provision serve a "noble purpose" because they "virtually guarantee[]" that, "even for claims of questionable merit," AT&T will make whole any aggrieved customer who takes the few minutes necessary to complete a one-page form available on AT&T's website. Pet. App. 39a-40a. The Ninth Circuit was also constrained to concede, albeit in a footnote, that "this is ... a good thing." *Id.* at 11a n.9. Moreover, even for claims not resolved prior to arbitration, the provision creates "a substantial inducement for the consumer to pursue the claim in arbitration." *Id.* at 40a. Not surprisingly, then, the district court concluded that "a reasonable consumer may well prefer" AT&T's arbitration provision to the distant possibility of a class action that may yield, if anything, "pennies on the dollar." *Id.* at 42a. As discussed above, hornbook contract law dis-

poses of any contention that such a provision is "unconscionable" for the straightforward reason that a contract cannot be *both* preferable to a reasonable consumer *and* so conscience-shocking that only a delusional consumer would accept it.

In California, however, generally applicable contract law has lost much, if not all, of its relevance in the consumer arbitration context. This is because California has imposed a special obstacle to the enforcement of arbitration agreements: An agreement to arbitrate individually will not be enforced unless the party seeking to enforce it first proves that a class action is unnecessary to deter the underlying "wrongdoing" it is alleged to have committed. Pet. App. 9a-11a, 42a-47a.[9] Applying this novel rule, the district court concluded that AT&T had not produced sufficient "evidence" of arbitral deterrence to overcome "California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct." *Id.* at 44a-46a. Or, as the Ninth Circuit put it, even though "[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim," it is invalid under California law because "not *every* aggrieved customer will file a claim." *Id.* at 11a n.9 (emphasis added).

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[9] California courts' reversal of the settled rule that "the party asserting unconscionability as a defense has the burden of establishing that condition" (*Woodside Homes of Cal., Inc. v. Super. Ct.*, 107 Cal. App. 4th 723, 727-28 (2003)), is yet another distortion of the generally applicable doctrine. *See also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.").

As discussed above, this novel approach distorts traditional unconscionability doctrine. In addition, it creates serious—if not insurmountable—practical obstacles to the enforcement of arbitration agreements. To begin with, the requirement that the defendant *disprove* the supposed necessity of the "deterrent effect" of a class action implicitly assumes that, if the plaintiff is allowed to avoid his or her obligation to arbitrate, a class will be certified and prevail on the merits, and class members will ultimately recover. This series of assumptions, however, conflicts with the realities of class-action litigation—*e.g.*, that most putative class actions are never certified; that those that are certified often settle for just "pennies on the dollar with few consumers actually submitting claims"; and that, as a result, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." *Supra* pages 12-13 and note 6.

These implicit assumptions also saddle defendants with the untenable burden of disproving the propriety of class certification. This turns on its head the ordinary rule that there is *no* "presumption" in favor of certification and that the *plaintiff's* burden of proof that Rule 23's requirements are met is *not* "a lenient one." *In Re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2009); *see also, e.g.*, *Gen. Tel. Co. v. Falcone*, 457 U.S. 147, 161 (1982) ("[A] ... class action ... may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."). It is, however, realistically impossible for a defendant to make such a showing in a motion to compel arbitration. Because the right to compel arbitration may be waived by pursuing litigation in court, parties are admonished "to move to compel arbitration at an early stage, before engaging in ... discovery." *Berman v.*

Health Net, 80 Cal. App. 4th 1359, 1373 (2000). This makes sense because "discovery would ... subject the parties to the very complexities, inconveniences and expenses of litigation that they determined to avoid" in arbitration. *Suarez Valdez S.A. v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649-50 (11th Cir. 1988) (Tjoflat, J., concurring). Yet the very discovery that arbitration is intended to avoid "is often *necessary*" to resolve the issue of class certification. FED. R. CIV. P. 23, Advisory Committee Notes, 2003 Amendments (emphasis added). Thus, on a motion to compel arbitration, the Ninth Circuit's presumption that class treatment is appropriate is effectively irrebuttable.

The Ninth Circuit's approach is also contrary to the "very purpose" of the FAA in that it requires the defendant to negate an assumption that it has engaged in "wrongdoing" that requires "deterrence" *before* its right to arbitrate the merits of the *only* basis for that assumption—the plaintiff's allegations—will be enforced. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1274 (2009) ("[The FAA's] very purpose is to have an arbitrator, rather than a court, resolve the merits."); *cf. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (courts may not rely on "public policy" as a basis for addressing the merits of an arbitral dispute). This sort of one-sided, preliminary consideration of the substantive allegations also conflicts with "Congress' clear intent ... to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

Moreover, the defendant's burden to prove that "arbitration ... is an adequate substitute for the deterrent

effect of the class action mechanism"—*i.e.*, a sufficient "incentive to stop [the defendant's presumed] wrongdoing" (Pet. App. 45a)—is also a practical impossibility. As an initial matter, it indulges the fiction that class-action plaintiffs' attorneys who believe they have identified actionable wrongdoing will postpone filing suit to see whether arbitration proves an "adequate ... deterrent." The reality, of course, is that the first hint of a colorable claim triggers a "race to the courthouse" among lawyers hoping to land a leading role in the litigation and a share in any attorneys' fees. Thus, if a defendant promptly moves to compel arbitration in response to the typical putative class action, it will be impossible for it to show that the plaintiff's allegations are already being addressed in arbitration.

Finally, it is unclear how a defendant could ever prove to the Ninth Circuit's satisfaction that arbitration is an "adequate ... deterrent" to its own "wrongdoing" (Pet. App. 45a) short of ceasing whatever practice is alleged to be unlawful. In addition to further illustrating the impossibility of California's test, this line of reasoning conflicts with the FAA by requiring the defendant, in effect, to admit that it has acted unlawfully simply to obtain enforcement of its agreement to arbitrate. *Preston*, 552 U.S. at 355–56.

In sum, California's novel and elusive approach to unconscionability not only imposes seemingly insurmountable obstacles to the enforcement of tens of millions of arbitration agreements but also, by imposing such onerous burdens on defendants seeking to enforce arbitration agreements, "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275.

B. Class Actions Are Inherently Incompatible With Arbitration.

Just last Term, this Court recognized that (1) the advantages of arbitration, which have been repeatedly touted by Congress and this Court, are "much less assured" in class arbitration; (2) imposing class-wide procedures "fundamental[ly] changes" the nature of arbitration; and (3) given the increased stakes and limited judicial review, parties cannot be presumed to have consented to class arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775-76 (2010). The Court was correct. In fact, as explained below, the advantages of arbitration are nonexistent in the class setting; class-wide procedures are inherently incompatible with core features of arbitration; and no rational defendant would willingly agree to the procedure. Thus, California's insistence that consumer arbitration agreements allow class arbitration is not merely a requirement that certain procedures be available in arbitration (though it is preempted by the FAA for that reason alone);[10] rather, it is an attack on arbitration itself, an effort to "chip away at [the FAA] by indirection." *Adams*, 532 U.S. at 122.

1. The Advantages Of Arbitration Do Not Exist In Class Arbitration.

The Court recently reiterated that the fact "that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow

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[10] *See, e.g., Stolt-Nielsen*, 130 S.Ct. at 1774 (reiterating that "parties are generally free to structure their arbitration agreements as they see fit," including "agree[ing] on rules under which any arbitration will proceed" (quotation marks omitted)).

inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1471 (2009) (emphasis added). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 130 S.Ct. at 1775. These advantages of traditional, individual arbitration do not exist in class arbitration, which by its nature is protracted, complex, and expensive.

First, in contrast to the informality, streamlining, and expedition that are hallmarks of individual arbitration, class arbitration requires complex procedures that blur the distinction between litigation and arbitration. For example, the AAA's class arbitration rules largely copy the Federal Rules of Civil Procedure. *See* AAA, Supplementary Rules for Class Arbitrations, *at* http://www.adr.org/sp.asp?id=21936. Therefore, just as in court, class arbitration requires discovery, full briefing, an evidentiary hearing, and a written ruling on class certification. If a class is certified, absent class members must be notified and given an opportunity to opt out. *Id.*, Rule 6. The parties must then engage in protracted and expensive merits discovery typical of high-stakes class litigation. And, finally, there must be a full hearing—with an opportunity for the defendant to present individualized defenses—and a written award on the merits. *Id.*, Rule 7. Alternatively, if there is a settlement, there must be another round of notice to class members, an opportunity to file objections, more briefing, a fairness hearing, and a written ruling. *Id.*, Rule 8.

As these procedures suggest, the cost savings of individual arbitration do not translate to class arbitration. Indeed, given that it entails substantial arbitrators' fees that have "no equivalent in a traditional, judicial class action," class arbitration may prove more expensive than its judicial counterpart. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 64 (2007). At minimum, it is clear that, unlike individual arbitration, it is *not* a "less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

The emerging data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. Indeed, the AAA's own statistics show that "the median time frame from filing [a AAA class arbitration] to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days."[11] While 19-21 months might be a reasonable period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, 85% of the cases included in the average were terminated *before any ruling on class certification*—and *none* "resulted in a final award on the merits." AAA *Stolt-Nielsen* Brief at 24. Thus, like its court-administered counterpart, a class arbitration is likely to take years to complete.

The delay inherent in class arbitration is in stark contrast to the speed and efficiency of individual consumer arbitration, which, on average, results in an award

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[11] Brief of the AAA as *Amicus Curiae* in Support of Neither Party, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), at 24 [hereinafter, "AAA *Stolt-Nielsen* Brief"], *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_NeutralAmCuAAA.pdf.

on the merits in only six months—only four months if a customer elects to have the case decided on documentary submissions alone.[12]

In short, class arbitration offers none of the advantages of traditional arbitration—*e.g.*, its speed, low cost, and streamlined proceedings—that both Congress and this Court have recognized are helpful to business and consumers alike.

2. Arbitration Lacks The Safeguards And Judicial Oversight That Are Indispensable To Class Litigation.

The judicial oversight that accompanies class-action litigation also guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms that end meritless litigation before discovery or trial and a judge with no financial incentive to certify a class. Both sides benefit from full appellate review at all critical stages of the litigation. Finally, class members benefit from judicial protection of their due-process rights, which also provides defendants with assurance that absent class members will be bound by the result. None of these protections is assured in arbitration, and some are nonexistent.

i. This Court has imposed pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Rei-*

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[12] AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, *at* http://www.adr.org/si.asp?id=5027.

ter v. Sonotone Corp., 442 U.S. 330, 345 (1979) ("District courts must be especially alert to identify frivolous [class actions] brought to extort nuisance settlements...."). Motions to dismiss and motions for summary judgment are thus common methods for disposing of legally and factually deficient lawsuits short of trial. In arbitration, however, dispositive motions are disfavored; indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 113 (2003). This characteristic of arbitration likely is an extension of the common wisdom that an award may be vacated because the arbitrator refused to hear enough evidence but never because he or she heard too much. *Cf.* 9 U.S.C. § 10(a)(3). In any event, in individual arbitration, this procedural limitation is widely accepted as part and parcel of arbitration's informality and streamlined proceedings. In class arbitration, however, the likely unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on meritless claims. *Cf. Twombly*, 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases")

ii. In addition, class arbitration creates the special problem that arbitrators have powerful financial incentives to certify a class. Put simply, arbitrators, who are compensated based on the amount of time they devote to a case, stand to earn far more if they allow a class arbitration to proceed than if they do not. Clancy & Stein, *supra*, at 73-74. As this Court has recognized, a party "might ... with reason" fear a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against him." *Tumey v. Ohio*, 273 U.S. 510, 523, 533 (1927).

Reinforcing this concern, the AAA's statistics indicate that arbitrators are in fact more likely to certify a class than either federal or state judges. Arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA Rules—a grant rate of 57.14%. *See* AAA *Stolt-Nielsen* Brief at 22. In contrast, in a Federal Judicial Center study on the impact of CAFA, federal judges granted only 18 of 62 contested class-certification motions—a rate of only 29.03%. Willging & Wheatman, *supra*, at 634-35. In the same study, state judges granted 12 of 27 contested motions—a rate of 44.44%. *Id.* Thus, AAA arbitrators appear nearly *twice* as likely to grant class certification as federal judges, and significantly more likely to certify a class than even state court judges—the very judges whose "[a]buses" provoked CAFA's enactment (CAFA § 2(a)(4)).

In light of such incentives and evidence, most if not all defendants will choose federal courts, where they "have no reason to suppose that [the district judge] *wants* to preside over an unwieldy class action." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

iii. The extremely narrow scope of judicial review of arbitrators' class-certification decisions and final awards on the merits also poses intolerable risks for defendants. As this Court recently held, section 10 of the FAA lists the "exclusive" grounds for vacating an award, all of which "address egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Courts may *not* engage in "legal review generally." *Id.* In the context of individual arbitration, this

limitation is necessary "to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. "If ... parties who lose in arbitration [could] freely relitigate their cases in court, ... dispute resolution [would] be slower instead of faster[,] and reaching a final decision [would] cost more instead of less." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006).

In a class arbitration, however, the vastly increased stakes coupled with narrow judicial review amplify the cost of arbitrator error to an unacceptable level. As Justice Scalia put the problem: "You might not want to put your company's entire future in the hands of one arbitrator." Oral Argument Tr., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_02_634/argument; *see also Stolt-Nielsen*, 130 S.Ct. at 1776 ("[T]he commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited."). No rational business will do so willingly.

Moreover, even in court, a class-action defendant faced with such significant potential liability is "under intense pressure to settle" (*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298-1299), "even if the [plaintiffs'] position is weak" on the merits (*Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)). In arbitration, the lack of meaningful review—both at the class-certification stage and on the merits—intensifies this pressure and exacerbates the problem of "blackmail settlements." Indeed, a prominent plaintiffs' attorney speaking at an American Trial Lawyers Association convention touted that "decision[s] by the arbitrator with

respect to class certification and an ultimate award are virtually non-appealable" as "a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71; *cf. Pulco v. Chase Bank USA, N.A.*, 605 F.3d 172 (3d Cir. 2010) (en banc) (rejecting plaintiffs' argument that the enforceability of a class waiver should be determined by the arbitrator, not the court).

In an apparent attempt to address one aspect of this problem, the AAA authorizes the parties to pursue interlocutory judicial review of arbitrators' class-certification decisions, describing the opportunity as "akin to ... interlocutory appellate review of district court class certification decisions." AAA *Stolt-Nielsen* Brief at 19. This comparison is inapt because the arbitrator's decision is reviewable only on the narrow grounds specified in 9 U.S.C. § 10; more searching review "akin to" federal appellate review under Fed. R. Civ. P. 23(f) appears to be foreclosed by *Hall Street*. Thus, the review contemplated by the AAA rules remains an inadequate safeguard.

iv. Finally, it remains uncertain whether class arbitration is capable of protecting class members' due-process rights and producing legally binding results. Most courts have held that due-process protections do not apply to private arbitration because the parties "voluntarily" consent to the arbitral process. *E.g., Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991). How this reasoning applies to class arbitration remains unclear. For example, do absent class members "voluntarily" consent to a class arbitration, even if they never receive actual notice of its pendency? If not, will an arbitration that fails to "provide minimal procedural due process protection" bind

absent class members? *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Are arbitrators even capable of providing such protections? *See generally, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006) (concluding that, without significant ongoing judicial supervision, they are not).

As this Court has recognized, whether a class-action defendant "wins or loses on the merits, [it] has a distinct and personal interest in seeing the entire plaintiff class bound by [the judgment] just as [it] is bound." *Shutts*, 472 U.S. at 805. No rational defendant will agree voluntarily to a procedure that involves all the same risks and potential liability of a class action without the concomitant assurance that the result will bind absent class members.

C. California Courts Have Undermined The FAA By Creating Unpredictability In The Law.

While most courts enforce arbitration provisions like AT&T's, which offer a fair and viable mechanism for resolving disputes on an individual basis, courts in California and a handful of other states have not. This unpredictability in the law significantly undermines the certainty and value of the federal right to enforcement of arbitration agreements for businesses with customers dispersed regionally or nationally.[13] It is therefore es-

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[13] This unpredictability is exacerbated by the Ninth Circuit's heads-I-win-tails-you-lose rulings that, on one hand, a non-California company cannot specify that the law of its home state governs its contracts with California residents because of California's supposedly "materially greater interest" in those contracts

sential that the Court make clear that such provisions are enforceable *as a matter of federal law*.

To be sure, the FAA does permit courts to apply generally applicable state contract law to arbitration agreements and thus allows for *some* degree of variation in their interpretation and enforcement. In general, however, this causes few difficulties because "contract law is not at its core diverse, nonuniform, and confusing." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) (quotation marks omitted). The relative uniformity of state contract law promotes the FAA's purpose of making arbitration agreements predictably enforceable.

"Unconscionability," however, "is one of the most amorphous terms in the law of contracts" (7 PERILLO, *supra*, § 29.1, at 377), and courts in California and a handful of other states have seized on this aspect of the doctrine as an opportunity to evade the FAA. These courts have misapplied the doctrine to invalidate arbitration agreements not because of any "gross imposition on the particular [plaintiff] at issue"—the traditional, generally applicable basis for a finding of unconscionability—but based instead on "broadly based considerations of public policy." Bruhl, *supra*, at 1443-44. These decisions conflict with this Court's recent reaffirmation that,

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(*Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086 (9th Cir. 2010) (Texas company); *Oestreicher v. Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) (Florida company)), while, on the other hand, a California company cannot specify that the laws of its nonresident customers' home states govern their contracts because of California's supposedly "materially greater interest" in the company's conduct (*Masters v. DirecTV, Inc.*, 2009 WL 4885132 (9th Cir. Nov. 19, 2009)). The ultimate result in all these cases was to invalidate a consumer agreement requiring individual arbitration.

under the FAA, "the enforceability of [an] arbitration agreement [cannot] turn on [state] public policy." *Buckeye*, 546 U.S. at 446 (quotation mark omitted). Moreover, as Justice Ginsburg observed, "public policy has been called an unruly horse." Oral Argument Tr. at 34, *Buckeye*, 546 U.S. 440. If this previously stabled horse is allowed out of the barn under the cover of "unconscionability," decades of FAA jurisprudence will be quickly and easily subverted. *Cf. Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959) (the FAA was enacted to overrule "a great variety" of judicial "devices and formulas" declaring arbitration agreements "against public policy").

For this reason, courts' misuse of the unconscionability doctrine to advance broad "public policy" goals has created substantial unpredictability in arbitration law. This is problematic because businesses often use the same arbitration agreement in customer contracts nationwide. Thus, identical or near-identical provisions have been upheld in many jurisdictions while being invalidated in others. As a result, it has become impossible to advise clients reliably as to how to draft arbitration agreements that will be fair and "universally enforceable." *Allied-Bruce*, 513 U.S. at 279. In *Southland*, this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." 465 U.S. at 15. That, however, is precisely the result of courts' misuse of the unconscionability doctrine.

D. A Ruling Enforcing The Pro-Consumer Arbitration Provision At Issue Would Promote The Federal Policy Favoring Arbitration.

The "third-generation" arbitration provision at issue in this case represents the culmination of an evolution of consumer arbitration provisions. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 508-09, 512-16 (2009). Apparently taking its cues from decisions invalidating "first-generation" and "second-generation" provisions, AT&T revised its arbitration agreement to, among other things, make available the "Premium" and "Attorney Premium." *See id.* at 512-16; Pet.'s Br. 5-8. No arbitration provision is more pro-consumer than AT&T's. As the district court found, AT&T's provision "provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim." Pet. App. 42a. Thus, there can be no question that an individual customer "effectively may vindicate his or her" claims under the provision. *Randolph*, 531 U.S. at 90 (alteration omitted). What is at issue, then, is *not* a fact-bound unconscionability determination but rather a *per se* rule that consumer contracts calling for traditional arbitration on an individual basis are invalid. As Judge Reinhardt put it, while "California courts [have] said that [such agreements are] not always invalid, ... I don't think they've ever found one that was okay." *Laster* Oral Argument Tr., *supra* page 8, at 17:33.

The Ninth Circuit's *per se* rule could not be more inimical to the FAA's "congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. As this Court has recognized, "Congress, when enacting [the FAA], had the needs of consumers ... in mind." *Allied-Bruce*, 513 U.S. at 280. This is because "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Id.* Innovative arbitration provisions like AT&T's promote this congressional goal by ensuring that arbitration is, in fact, "helpful to individuals" and "a less expensive alternative to litigation." A ruling that such a provision is enforceable as a matter of "federal substantive law" (*Moses H. Cone*, 460 U.S. at 24) would further the FAA's pro-arbitration policy by encouraging additional companies to adopt similarly pro-consumer arbitration provisions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations collectively employing approximately twenty million people. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based litigation.

A three-judge panel of the Ninth Circuit below, applying California state law, refused to enforce a consumer arbitration agreement containing a class action waiver provision, concluding that bans on class-wide arbitration are both substantively and

procedurally unconscionable. Although the agreement containing the challenged class action waiver provision arose in the consumer context, the Court's ruling also potentially could influence the use of mandatory arbitration agreements generally, and class action waivers specifically, in the employment arbitration context.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1999); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza v. Pyett*, __ U.S. __, 129 S. Ct. 1456 (2009); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010); and *Rent-A-Center, West, Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772 (2010). EEAC thus is quite familiar with the issues presented in this case and is well-situated to brief the Court on the significant importance of the issues beyond the immediate concerns of the parties to the case.

SUMMARY OF ARGUMENT

This Court repeatedly has emphasized that a principal aim of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, is to construe private arbitration agreements in accordance with the parties' desires and expectations. "The FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To the

contrary, courts are to "rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("as with any other contract, the parties' intentions control").

Thus, where the parties to an arbitration agreement have expressly waived the availability of certain procedures, such as class-wide arbitration, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citation omitted). The Ninth Circuit in the decision below impermissibly refused to do so.

Even more troubling, and despite the Ninth Circuit's claims to the contrary, the decision below endorses a California state policy that holds private agreements to arbitrate to a higher standard of enforceability than is generally applicable to other private contracts, in direct contravention of the FAA. This Court has held that such a state law, whether statutorily or judicially created, is incompatible with, and therefore is preempted by, the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

The California public policy expressed in the decision below, which in effect establishes an across-the-board ban on class arbitration waivers, also undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing

to arbitrate workplace disputes. Not only does it impose the very cost burdens and procedural complexities that both employers and employees, by agreeing to arbitrate, sought to avoid, but it also undermines uniform application of multistate employers' ADR procedures. The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, which benefits not only them but also their employees. It also significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

ARGUMENT

I. THE DECISION BELOW SHOULD BE REVERSED BECAUSE IT IMPERMISSIBLY CONFLICTS WITH, AND THEREFORE IS PREEMPTED BY, THE FAA

A. The Strong Federal Policy Supporting Arbitration Requires That Agreements To Arbitrate Be Enforced In Accordance With Their Terms

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This language "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As this Court recently observed in *Stolt-Nielsen S.A. v. AnimalFeeds Inter-*

national Corp., "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." 130 S. Ct. 1758, 1773 (2010). The FAA thus "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, at 24-25 (footnote omitted).

Indeed, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (citation omitted). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted).

This Court repeatedly has reaffirmed the federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Randolph*, 531 U.S.

79 (2000). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone*, 460 U.S. at 24).

Section 4 of the FAA provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Upon determining that the agreement to arbitrate is valid and addresses the disputed claim, the FAA requires, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

In *Gilmer*, this Court held that an arbitration agreement that an individual signed as a condition of employment, in which he pledged to submit to arbitration any dispute that might arise out of his employment or the termination thereof, was enforceable under the FAA, so as to require him to arbitrate his claim that his employer engaged in age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* In so doing, the Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (citations omitted).

B. The Availability Of Class Arbitration Procedures Generally Can Be Waived By The Parties To A Valid Arbitration Agreement

Parties to arbitration agreements often agree to streamlined procedural mechanisms that do not allow for claims to be brought on a class-wide basis. As this Court observed in *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. at 1469 ("The decision to resolve . . . claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace . . . discrimination; it waives only the right to seek relief from a court in the first instance").

The ability to bring a class action is one of the procedural rights that can be waived in a valid arbitration agreement. As the Seventh Circuit has observed:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

Champ v. Siegel Trading Co., 55 F.3d 269, 276 (7th Cir. 1995) (citations omitted); *see also Stolt-Nielsen*, 130 S. Ct. at 1775 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," noting that "the relative benefits of class-action arbitration are much less assured . . .").

C. The Decision Below, Which Imposes Significantly More Stringent Standards Regarding The Enforceability Of Mandatory Agreements To Arbitrate Than Are Required For Other Types Of Contracts, Directly Contravenes The Plain Language Of The FAA

This Court's longstanding precedent makes clear that no state may hold private agreements to arbitrate to a higher standard of enforceability than is generally applicable to other private contracts without running afoul of the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). Whether statutorily or judicially created, a state law that imposes greater burdens on the enforceability of mandatory agreements to arbitrate than apply to other types of contracts is incompatible with, and therefore is preempted by, the FAA.

In *Southland Corp. v. Keating*, for instance, this Court held that a state law requiring resolution by judicial forum of all applicable claims—and thus precluding the enforcement of valid mandatory arbitration agreements—impermissibly conflicts with, and is preempted by, Section 2 of the FAA, which provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It observed:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be a part of a written . . . contract "evidencing a transaction involving commerce" and such clauses may be

> revoked upon "grounds as exist at law or in equity for the revocation of any contract."

465 U.S. at 10-11 (footnote omitted).

The Court in *Southland* thus concluded, "[i]n enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10. It reaffirmed that principle in *Perry v. Thomas*, observing that:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law.

482 U.S. at 492 n.9 (citations omitted).

Subsequently, in *Doctor's Associates, Inc. v. Casarotto*, this Court ruled that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." 517 U.S. at 687. There, the Court considered the validity of a Montana state law that imposed a special notice requirement for all contracts subject to arbitration. Because this special notice requirement applied only to agreements to arbitrate, and not "'any contract,'"

the Court concluded that the requirement "is thus inconsonant with, and is therefore preempted by, the federal law." *Id.* at 688.

In determining that the class action waiver contained in Respondents' consumer contracts was unconscionable and therefore unenforceable under California law, the court below relied on the Ninth Circuit's decision in *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), in which it first "decided the invalidity of an arbitration agreement banning class actions" under California law. Pet. App. 2a. In *Shroyer*, the Ninth Circuit interpreted the California Supreme Court's 2005 ruling in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), "as creating a three-part test to determine whether a class action waiver in a consumer contract is unconscionable": whether (1) the agreement is a contract of adhesion; (2) the dispute between the contracting parties is likely to involve "small amounts of damages"; and (3) the plaintiff has *alleged* (not proven) that the party "with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money." Pet. App. 7a.

The court below ultimately concluded that each prong of the *Discover Bank* unconscionability test was satisfied, although it did point out "that 'there are most certainly circumstances in which a class action waiver is unconscionable under California law despite the fact that all three parts of the *Discover Bank* test are not satisfied.'" Pet. App. 7a. It further determined, erroneously, that *Discover Bank's* unconscionability test is not expressly preempted by the FAA, because the test is one of general applica-

bility to all contracts, and the "FAA 'does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause.'" Pet. App. 12a.

Any characterization of the *Discover Bank* rule as one applicable to contracts in general is grossly inaccurate at best and, at worst, is plainly false. In fact, the *Discover Bank* rule is *not* one of *general* applicability, but rather is directed *specifically* at arbitration agreements. A recent analysis of cases decided by the California Court of Appeals involving unconscionability challenges bears this out. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (Fall 2006).

According to the results of the study, arbitration agreements challenged as unconscionable under California state law were invalidated by the courts 47% of the time, whereas only 11% of "ordinary" contracts were deemed unenforceable on that ground. Broome at 48. Thus, "[c]ontract terms, other than arbitration clauses, are rarely held to be unconscionable." *Id.* at 54. The study author therefore concludes that:

> [T]he standard for establishing unconscionability is more easily satisfied when the contractual term being challenged is an arbitration agreement. An empirical review reveals that unconscionability challenges succeed with far greater frequency when the disputed term is an arbitration provision. Through both empirical and substantive analysis, therefore, the cloak of the "generally applicable" contract defense of unconscionability is removed, and these unique

> standards and requirements are revealed for what they really are: manifestations of the California courts' ingrained bias against arbitration as an alternative to the judicial forum.

Id. at 66 (footnote omitted). The author goes on logically to conclude that the California courts' "current approach is preempted by the FAA." *Id.*

In holding the arbitration agreement in the instant case to a higher standard than applies to other types of contracts, the court below blatantly disregarded this Court's prior rulings prohibiting states from regulating such agreements beyond the bounds of the FAA. Accordingly, the decision below should be reversed.

II. A STATE BAN ON CLASS ACTION WAIVERS DEFEATS MOST, IF NOT ALL, OF THE ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATION, ESPECIALLY IN THE EMPLOYMENT CONTEXT

A. Imposing Class Arbitration Even Where The Underlying Agreement Contains An Express Class Action Waiver Provision Fundamentally Would Alter The Expectations Of Both Employers And Employees By Imposing The Very Costs And Burdens Sought To Be Avoided By Forgoing Court Litigation

As this Court has observed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and

those containing class action waivers specifically, is particularly misplaced in the employment context, where arbitration offers significant advantages to both employers and employees. Indeed, there are "real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* As one commentator has observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003). The significant financial benefits that employees derive from arbitration are likely to disappear altogether if they are forced to

submit to complex, class-based arbitration procedures, despite having agreed to waive such procedures.

Allowing an arbitration to proceed as a class action despite unambiguous contractual language to the contrary also would undermine the efficiencies of arbitrating workplace disputes. Unlike the typical arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend. Indeed, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775. As this Court pointed out last Term in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties . . . thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

Id.

Furthermore, the significantly higher costs and exposure posed by class actions creates enormous pressure to settle rather than run even a small risk of catastrophic loss. This increases greatly the potential for what some courts have called "judicial blackmail":

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added); *see also Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing cases referring to the pressure on defendants to settle class actions as "judicial blackmail"). These issues are even more acute in the context of arbitration, which by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Permitting class arbitration where the parties have agreed not to do so thus would defeat one of the most mutually advantageous purposes of arbitration—lower-cost resolution of disputes.

B. State Policies That Place Greater Restrictions On Agreements To Arbitrate Than Exist For Other Contracts Undermine Employers' Efforts To Develop And Enforce Uniform ADR Procedures

The court below, along with most California state courts and some other federal courts applying California law, continue to subject mandatory arbitration agreements generally—and those containing class action waiver provisions specifically—to higher enforceability standards than are imposed upon other types of contracts. Multistate employers thus are faced with the real possibility that their alternative dispute resolution programs will not be enforced uniformly for all of their employees. Indeed, employers are all but assured that arbitration agreements containing class action waivers, while valid in most other states, will be deemed unenforceable in California.

The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-893

In The
Supreme Court of the United States

AT&T MOBILITY, LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF FEDERAL JURISDICTION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction who teach and write about arbitration, preemption, and/or the proper allocation of interpretive authority between the state and federal courts. Although *amici* hold a range of views as to the normative desirability of arbitration as a method of dispute resolution, the proper distribution of power between state and federal courts, and the appropriateness *vel non* of putative class-action bans such as the one at issue here, *amici* have common cause when it comes to the proper respect due to state courts in their interpretation of state contract law. To that end, *amici* offer two modest observations with regard to the question presented in this case:

First, *amici* all agree that section 2 of the Federal Arbitration Act, 9 U.S.C. § 2,[2] was not meant to

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[1] The parties have each filed blanket consent letters with regard to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] In full, § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an

(Continued on following page)

displace "generally applicable" rules of state contract law, but was intended (and drafted) only as an anti-discrimination provision, barring states from subjecting arbitration agreements to harsher rules than other contracts. As such, the FAA does not – and was not meant to – preempt any state-law contract rule of general applicability.

Second, *amici* agree that state courts are generally entitled to deference in determining the substance and scope of state contract law, including whether particular rules apply only to agreements to arbitrate, or are instead rules of general applicability. This interpretive discretion is critical, because under the "savings clause" of § 2, state contract rules are not preempted as applied to arbitration agreements so long as they constitute "grounds . . . at law or in equity for the revocation of any contract." Thus, whereas the question whether the FAA's savings clause is satisfied *is* technically a question of federal law, that question turns almost entirely on the scope of a particular rule of contract interpretation under *state* law, an issue that both federal statutes and constitutional design commit to the state's court of last resort.

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existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

As set forth below, although such deference to state courts is not – and should not be – absolute, *amici* believe that there are compelling federalism-based reasons to place a high burden on the party seeking to contest the state court's characterization of state law. Where, as here, the state court has specifically concluded that the relevant principle of contract law is "generally applicable," the party claiming preemption must convincingly demonstrate that the state court is either mischaracterizing or misapplying its own state law – that it is engaged in "obvious subterfuge" to avoid the FAA's preemptive effects. Any other rule would invite courts to federalize state contract law as applied to arbitration agreements, which would not only be irreconcilable with both the language and purpose of the FAA, but would more generally infringe upon the proper respect due to state courts within our constitutional system.

Because Petitioner cannot meet that burden here, this Court should affirm the decision below, or, in the alternative, dismiss the writ of certiorari as improvidently granted.

ARGUMENT

I. The Federal Arbitration Act Does Not Preempt Generally Applicable Rules of State Contract Law.

Section 2 of the Federal Arbitration Act, which "intended to foreclose state legislative attempts to

undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984), provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has consistently construed that language to mean what it says, *i.e.*, that arbitration agreements should be enforceable to the same extent as any other contract under the governing law of the relevant jurisdiction. *See, e.g., Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). Thus, "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions," whereas "generally applicable contract defenses, such as fraud, duress, or unconscionability, *may* be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

As a result, the effect of § 2 "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Critically, though, the FAA did not purport to create a body of substantive federal *contract* law, or to delegate to federal judges the authority to fashion common-law rules of contract interpretation to govern disputes implicating the FAA. Instead, to the extent that state law *does* provide "grounds . . . at law or in equity for the revocation of any contract," such state

law governs by virtue of § 2 of the FAA. *See, e.g.*, *Arthur Anderson, LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

Congress's choice in § 2 of the FAA to leave intact generally applicable rules of state contract law is wholly consistent with the broader policy underlying the Act – "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the *same footing* as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citation omitted) (emphasis added). To that end, § 2 does not privilege agreements to arbitrate, but is instead an anti-discrimination provision, preempting only those rules of state contract law "that take [their] meaning precisely from the fact that a contract to arbitrate is at issue." *Perry*, 482 U.S. at 492 n.9; *see also Casarotto*, 517 U.S. at 687 ("Congress precluded States from singling out arbitration provisions for suspect status . . . "). Where a rule of state contract law applies to any contract governed by that state's law, there is no preemption under § 2.

II. A State Court's Interpretation of the Scope of State Contract Law is Entitled To Considerable Deference.

As the above discussion suggests, the critical question in this case is whether the relevant state-law contract rule – here, the defense of unconscionability – is a ground for revoking *any* contract under state law. If it is not such a "generally applicable" rule, then it is preempted by § 2 of the FAA as applied to agreements to arbitrate. If it *is* generally applicable, then the FAA has no bearing, other than to confirm that the defense also applies to arbitral agreements.

Although there is a dearth of case law on the subject, it should follow that state courts are entitled to considerable deference in determining whether "grounds . . . exist at law or in equity for the revocation of any contract" within the meaning of § 2 of the FAA. Whereas that question technically arises under federal law, it is necessarily answered by reference to state law, since its resolution turns directly on the substantive scope of the underlying state-law rule. As a matter of state policy, it is for state lawmakers (and courts) in the first instance to decide how broadly state contract law – including defenses – applies. Moreover, as noted above, § 2 of the FAA deliberately turns on, rather than supplants, the state's policy choice.

To be sure, state courts may not frustrate the purpose of the FAA by bestowing the "generally

applicable" label upon a rule of contract law that in fact discriminates against arbitration agreements. As Justice Marshall warned in *Perry*,

> A court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

482 U.S. at 492 n.9. *Perry* thereby suggests that a "generally applicable" rule of state contract law does not exist simply because a state court *says* that it does. But it is equally true that federal courts are bound by both statute and constitutional tradition to defer to state courts in their interpretation of state law. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law, and . . . we are bound by their constructions except in extreme circumstances . . . ") (citations omitted); 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

In the analogous context of the independent and adequate state grounds doctrine, this Court long has struck a comparable balance between the deference due to state courts in interpreting state law and the need to ensure that state courts are not using that authority to frustrate the enforcement of federal rights. *See, e.g.*, *Beard v. Kindler*, 130 S. Ct. 612, 617-18 (2009). To that end, this Court has held that "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question," *Douglas v. Alabama*, 380 U.S. 415, 422 (1965), and has analyzed, in dozens of cases, whether state procedural rules purportedly precluding federal review have been "firmly established and regularly followed," *see, e.g.*, *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). *See generally Mullaney*, 421 U.S. at 691 n.11 ("On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.'") (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)).

In all of these decisions, this Court has treated the scope of the state procedural bar as a question of state law, even where it has seen the adequacy of the bar as a matter for federal review. And in all of these cases, the burden has been on the party seeking review to demonstrate the *inadequacy* of the state's reliance on state law, not the other way around. *See, e.g.*, *South Dakota v. Neville*, 459 U.S. 553, 569 n.4 (1983).

Moreover, although this burden carries jurisdictional significance in the context of appeals from state courts, *see* 28 U.S.C. § 1257, the existence of appellate jurisdiction in other cases has not relieved this Court of its responsibility to respect state courts' autonomy over state law, *see, e.g.*, *Volt*, 489 U.S. at 474 ("[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."). Indeed, this Court even defers to the interpretation of state law by the lower federal courts. *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) (noting the "presumption of deference given the views of a [lower] federal court as to the law of a State within its jurisdiction").

Amici submit that the same principles should guide this Court's resolution of the question presented in this case: where – as here[3] – a state court

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[3] As the Court of Appeals in this case explained, the California Supreme Court has specifically resolved the state-law question here at issue. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005) ("[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally"); *see also id.* ("In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements."). *See generally Laster v. AT&T Mobility, LLC*, 584 F.3d 849, 854-59 (9th Cir. 2009) (relying upon *Discover Bank*), *cert. granted*, 130 S. Ct. 3322 (2010) (No. 09-893). And the Ninth Circuit is hardly the only Court of Appeals to look to *Discover Bank* as the governing statement of California law on

(Continued on following page)

has spoken to the scope of a particular rule of state contract law,[4] the burden must be on the party arguing for preemption to demonstrate that the rule of state contract law at issue is *not* in fact "generally applicable," and that the state court is thereby frustrating the purpose and language of the FAA – an "obvious subterfuge" to evade the effect of § 2.

Recognizing such a burden in cases arising under § 2 serves two distinct purposes: *First*, it vindicates Congress's central goal in enacting the FAA in general (and § 2 in particular), *i.e.*, to ensure that arbitration agreements are on equal footing under state law as compared to other private contracts. Congress could have chosen to create a special body of federal contract law to govern arbitration agreements, or to delegate to the federal courts the power to fashion common-law rules of contract interpretation. *Cf. Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). Instead, though, it chose only to bar unequal treatment of arbitration agreements by state courts, leaving state law otherwise intact. In

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the scope of the unconscionability defense. *See, e.g., Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 132-40 (2d Cir. 2010).

[4] Of course, where the state court of last resort has yet to address the issue, there is no decision to which deference is owed. Even in that context, though, deference is still ordinarily due to what the federal court *thinks* the state court of last resort would say. *See, e.g., Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.).

contrast, encouraging federal courts to routinely second-guess state court interpretations of state contract law *only* in the context of arbitration agreements would perpetuate the inequality that the FAA was enacted to obviate, since it would likely produce two distinct bodies of contract law within an individual state: one for arbitration agreements, and one for everything else.

Second, and separate from vindicating Congress's specific intent in enacting the FAA, the recognition of such a burden would strike the same balance that this Court has routinely achieved in analogous contexts between the respect due to state law as the product of a distinct sovereignty within our constitutional system, and the need to ensure that state courts do not use their power to interpret state law in a manner intended to frustrate federal remedies. Respect for the states as sovereign entities must include a default respect for the processes of their courts absent some evidence of invidious intent, with any doubt resolved in favor of the state courts. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2608 n.9 (2010) (plurality opinion). Any imputation of intent to obstruct federal law on the part of state courts absent such a showing would be fundamentally inconsistent with the respect to which those tribunals are due.

Finally, although *amici* take no position on the particular objective indicia that might establish such

nefarious conduct on the part of state courts, it should go without saying that, at a minimum, a party arguing for preemption under § 2 should have to identify non-arbitration contract disputes in which the same principle of state contract law was *not* applied.[5] Absent a clear showing to that effect, the considerations outlined above indicate that the state court should be taken at its word.

CONCLUSION

Because Petitioner has failed to meet its burden in this case, *amici* respectfully suggest that the decision below be affirmed. In the alternative, because this Court does not generally sit in judgment of a state court's interpretation of state law, *amici*

[5] It would appear difficult, if not impossible, for Petitioner to satisfy this requirement here since California state courts in fact *have* applied the state-law principle at issue to invalidate a class action ban provision that appeared not in an arbitration clause, but in a *judicial* forum-selection and choice of law clause. *See America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 18 (2001).

respectfully suggest that the writ of certiorari be dismissed as improvidently granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-893

In the Supreme Court of the United States

AT&T MOBILITY LLC, PETITIONER,

v.

VINCENT AND LIZA CONCEPCION, RESPONDENTS.

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BRIEF FOR THE STATES OF ILLINOIS, MARYLAND, MINNESOTA, MONTANA, NEW MEXICO, TENNESSEE, AND VERMONT AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When an otherwise unenforceable class-action ban is embedded in an arbitration agreement, is a state-law ruling precluding its enforcement under generally applicable contract law preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA")?

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INTEREST OF THE *AMICI CURIAE*

States have long declined to enforce contracts that are unconscionable or offensive to public policy. These and other state law contract defenses are an important means of protecting consumers against predatory or unfair treatment. In urging FAA preemption of a state-law determination that an adhesive class-action waiver is unconscionable, petitioner asks federal courts to second-guess decades of state contract law, without any administrable standard to guide them. Because the decision below preserves States' historical ability to develop and enforce contract law, the *Amici* States have a significant interest in the outcome of this appeal. Moreover, preempting state law here would effectively eliminate consumer class actions, an important complement to government efforts at safeguarding consumers against fraudulent and deceitful practices.

STATEMENT

1. As alleged in the complaint, respondents agreed to purchase cellular telephone service from petitioner in reliance on its promise that purchasers would receive a "free" cell phone. Pet. App. 1a, 19a. Respondents, who signed a wireless service agreement ("WSA") with a two-year term, received two cell phones without charge but paid $30.22 in sales tax, an amount calculated using the phones' full retail value. *Id.* at 2a-3a. Respondents subsequently filed this putative class action, alleging that petitioner had engaged in unfair and deceptive trade practices under California law by charging sales tax on phones it had marketed as "free." *Id.* at 1a, 17a-18a.

2. Petitioner moved to compel arbitration, seeking to enforce the WSA's arbitration clause, which required respondents to resolve any dispute arising out of the agreement through an informal claims process and, if that failed, through individual arbitration or in small-claims court. *Id.* at 4a, 19a-20a, 26a. The district court denied petitioner's motion, holding that the class-action waiver in the arbitration clause was unconscionable and therefore unenforceable under California contract law. *Id.* at 35a-47a. The court also rejected petitioner's argument that the FAA preempts California contract law. *Id.* at 47a n.11.

3. The court of appeals affirmed. *Id.* at 2a. The court first confirmed the lower court's holding that the arbitration clause and class-action waiver are unenforceable under state law. *Id.* at 4a-11a. Applying the test for unconscionability set forth in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the appellate court held that the class-action

waiver was unconscionable because (1) it appeared in a contract of adhesion, whose terms were not subject to negotiation; (2) disputes between the contracting parties were likely to involve small damages awards, giving consumers insufficient incentive to bring individual actions and effectively insulating petitioner from liability for wrongdoing; and (3) respondents had alleged that petitioner, the party with superior bargaining power, had deliberately cheated large numbers of consumers out of individually small sums of money. Pet. App. 7a-9a. The court calculated that "aggrieved customers will predictably not file claims," thereby "greatly reducing" petitioner's liability "for allegedly mulcting small sums of money from many consumers." *Id.* at 10a-11a & n.8 (internal markings omitted).

The court went on to sustain the district court's holding that the FAA does not preempt this application of California contract law. *Id.* at 12a-16a. As the appellate court explained, "'it is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable'" under the FAA. *Id.* at 5a (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007), itself citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-687 (1996)). In particular, § 2 of the Act provides that an arbitration clause "'shall be valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Ibid.* (quoting 9 U.S.C. § 2). Rejecting petitioner's argument that the *Discover Bank* rule singles out arbitration agreements for nonenforcement and thus is not within the scope of § 2's saving clause, the appellate court stated that the

rule represents a "refinement" of California's general unconscionability doctrine, *id.* at 12a (internal quotations omitted), echoing the state supreme court's determination that "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that * * * applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements" and thus "does not specifically apply to arbitration agreements, but to contracts generally," *Discover Bank*, 113 P.3d at 1112.

4. This Court granted certiorari on May 24, 2010.

SUMMARY OF ARGUMENT

Although under the FAA "[c]ourts may not * * * invalidate arbitration agreements under state laws applicable only to arbitration provisions," this Court has long held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" the Act. *Casarotto*, 517 U.S. at 687; accord *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). The California contract defense that petitioner challenges is "generally applicable." Accordingly, the FAA does not preempt it, and the novel preemption rule that petitioner offers fails on multiple grounds.

First, rather than merely protecting arbitration agreements from discrimination—as the text and history of the FAA command—petitioner would single out these agreements for special treatment, requiring their enforcement under circumstances that would invalidate a contract to litigate under state law. Not only does petitioner's approach contravene the FAA's language and purpose, but it also would be unworkable in practice, requiring federal courts to rethink state courts' application of their own contract doctrines. This, in turn, would contravene the federalism-based principle that state courts are the final arbiters of questions of state law and engender needless litigation on questions of federal preemption.

Second, petitioner's alternate, "conflict" preemption argument is equally offensive to state sovereignty. By focusing on purported statutory purposes with no basis in the FAA's text, petitioner blurs the distinction between the legislative and judicial roles and upsets

the bargain struck with the States—who were repeatedly assured that the Act would not interfere with state contract law—at the time of the FAA's enactment.

Finally, although petitioner would eliminate consumer class actions altogether, these suits are an effective supplement to government efforts to protect consumers against fraud and sharp dealing. Both federal and state consumer-protection laws openly encourage class actions, as a means of furnishing individual relief, notifying victims who otherwise might not know they have been injured, and deterring wrongdoing. The efforts of "private attorneys general" are especially valuable in this era of state budget cuts and limited resources, and petitioner's attempt to do away with consumer class actions is a further affront to the States' interests.

ARGUMENT

I. PETITIONER'S NOVEL PREEMPTION RULE NOT ONLY DEFIES THE FAA'S STATED PURPOSE, BUT IT WOULD LEAD TO MORE, NOT LESS, LITIGATION.

The FAA serves a well-defined aim. To overcome a perceived, historical judicial hostility to arbitration, the Act makes agreements to arbitrate future disputes as enforceable as other contracts, and it provides a streamlined procedure for holding recalcitrant parties to such agreements. At the same time, the Act is careful to leave traditional contract law defenses undisturbed, making arbitration clauses as enforceable as, but no more enforceable than, other contracts.

Petitioner's approach is impossible to square with the Act. Its rule would immunize agreements to arbitrate from contract law defenses that would invalidate other, non-arbitration contracts, contrary to the saving clause in § 2. And it would do so by requiring federal courts to undertake a protracted and standardless rethinking of state contract law traditions, ironically encouraging more of the litigation that arbitration agreements seek to avoid.

A. The FAA Undid Courts' Historical Refusal To Enforce Predispute Arbitration Agreements By Forbidding Courts From Singling Out These Agreements For Disfavor.

1. Modeled on a 1920 New York law, see Ian R. MacNeil, *American Arbitration Law* 68 (1992), Congress passed the FAA in 1925 to overturn courts' longstanding refusal to specifically enforce contracts to

arbitrate future disputes, *id.* at 20 (observing that party's refusal to adhere to predispute arbitration clause "was a breach of the arbitration agreement, but it was a breach for which only damages, not specific performance, were available, and these were largely ineffective") (footnotes omitted); see also *Arbitration of Interstate Commercial Disputes: Joint Hearing Before a Subcomm. of the Comms. on the Judiciary* ("*1924 Joint Hearing*"), 68th Cong. 35 (1924) ("[F]ollowing an anachronism in the English law, arbitration agreements have not been enforced by our courts in the United States."). A popular explanation for this historical prejudice against arbitration was "the jealousy of the English courts for their own jurisdiction," which purportedly led these courts to "refuse[] to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. Rep. No. 96, at 1-2 (1924), quoted in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 n.6 (1985).

Arbitration's promoters in the early Twentieth Century thus held one aim above all others—"elimination of the rule of revocability of arbitration agreements." MacNeil, *supra*, at 28. And § 2 of the FAA did precisely that. It abolished the longstanding "judicial hostility to arbitration agreements," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), by declaring such agreements to be "valid, irrevocable, and enforceable," 9 U.S.C. § 2; see also *1924 Joint Hearing* at 16 (statement of Julius Henry Cohen) ("What does this bill do? It destroys the anachronism in the law."); *Byrd*, 470 U.S. at 219 (Act's "purpose was to place an arbitration agreement upon the same footing as other contracts, where it belongs,

and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate") (internal quotations and citation omitted).

2. At the same time, Congress was careful not to displace any contract law beyond the anachronistic rule that had singled out arbitration agreements for non-enforcement. Section 2 thus qualifies the foregoing language—that promises to arbitrate are "valid, irrevocable, and enforceable"—with the following: "save upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause makes clear that, while the FAA does away with courts' historical refusal to enforce arbitration agreements, it does not require courts to treat these agreements any *better* than other contracts. In the words of the FAA's principal drafter, the goal was to make promises to arbitrate future disputes "*as* inviolable as any other business contract," Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 278 (1926) (emphasis added),[1] thus placing arbitration agreements "upon the same footing as other contracts, where [they]

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[1] Cohen's role as the Act's primary drafter was well known. See, *e.g.*, *Sales & Contracts to Sell in Interstate & Foreign Commerce, & Federal Commercial Arbitration: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 13 (1923) ("Julius Henry Cohen did it, primarily."); MacNeil, *supra*, at 85 ("This first draft of the [FAA] by Julius Henry Cohen covered the same subjects as the New York Arbitration Law of 1920 and, with one exception, in a virtually identical manner") (footnote omitted).

belong[ ]," H.R. Rep. No. 96, at 1 (1924). In short, "[a]s the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

3. For States, the saving clause is critical, for it ensures that the FAA preserves state contract law—even where that law has the effect of voiding an arbitration clause—by making arbitration agreements subject to all "general contract defenses." *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984). Under the saving clause, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis in original); cf. *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (preempting state law that "impose[d] prerequisites to enforcement of an arbitration agreement that [were] not applicable to contracts generally").

In this way, the saving clause memorialized repeated assurances that the Act would not interfere with state contract law, beyond eliminating the old judicial preference for litigation over arbitration. Members of Congress were told that the FAA would not "infringe[] upon the right of each State to decide for itself what contracts shall or shall not exist under its laws," for "whether or not a contract exists" in the first place "is a question of the substantive law of the jurisdiction wherein the contract was made." *1924 Joint Hearing* at 37; see also *Sales & Contracts to Sell in Interstate & Foreign Commerce, & Federal*

Commercial Arbitration: Hearing Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 5 (1923) (statement of Sen. Walsh) (arbitration agreements remain "open to all defenses, equitable and legal, that would have existed at law"). Similarly, House members received confirmation that—while the FAA would "correct[] * * * what seems to be an anachronism in our law, inherited from English jurisprudence" (refusing to specifically enforce agreements to arbitrate)—the Act would "not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to." 65 Cong. Rec. H1931 (daily ed. Feb. 5, 1924) (statement of Rep. Graham).

New York's 1920 arbitration law, on which the FAA was based and which included language identical to § 2 of the FAA, see *supra* p. 7, provided additional assurance of the continued vitality of state contract defenses, for that law preserved New York contract law from interference. See Osmond K. Fraenkel, *The New York Arbitration Law*, 32 Colum. L. Rev. 623, 625 (1932) ("All the usual reasons a contract right may be lost may be asserted in response to a petition to compel arbitration."). Indeed, by the time Congress passed the FAA, the New York statute had been interpreted to avoid any interference with the state common law of contract: a "provision for arbitration [is] of no more binding force than any other [contract] provision," for "[t]he Arbitration Law was passed to provide a means for enforcing an agreement to arbitrate; it did not otherwise change the law of contracts which is as applicable to such an agreement as to other terms and conditions." *Zimmerman v. Cohen*, 139 N.E. 764, 765

(N.Y. 1923); accord *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 291 (N.Y. 1921).

* * *

In the end, then, while § 2 displaces state laws that "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue," or that "rely on the uniqueness of an agreement to arbitrate" as grounds to refuse enforcement, *Perry*, 482 U.S. at 492 n.9, and while "[c]ourts may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions," "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2," *Casarotto*, 517 U.S. at 687 (emphasis in original). "By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Ibid.* (internal quotations omitted).

B. Petitioner's Proposed Rule Would Single Out Arbitration Agreements For Special Treatment, Require Federal Courts To Second-Guess State Court Decisions Interpreting State Law, And Encourage Needless Litigation.

Applying the foregoing principles, the FAA does not preempt application of California's unconscionability or public policy doctrines to bar class-action waivers in contracts of adhesion. This Court has identified unconscionability, specifically, as a "generally applicable contract defense[]" that survives preemption under § 2's

saving clause. *Casarotto*, 517 U.S. at 687. Nor does application of the defense single out arbitration for disfavored treatment in practice. On the contrary, as petitioner concedes, see Pet. Br. 28-31, the limits on class-action waivers that California contract law imposes apply to arbitration and litigation alike. Because California's unconscionability doctrine treats arbitration and litigation the same, California law is fully consistent with the FAA's goal of abolishing the outmoded rule disfavoring arbitration as an alternative to formal litigation.

Where, as here, a state contract defense is one of general application, and even in application it does not single out arbitration for disfavored treatment, it falls squarely within § 2's saving clause. Such a reading of § 2 is easily applied, avoids asking federal courts to second-guess and rewrite state contract doctrine, and saves parties and the federal courts from needless additional litigation.

1. Petitioner's Proposed Rule Would Make Arbitration Agreements More Enforceable Than Other Contracts.

Although petitioner repeatedly speaks as if the *Discover Bank* rule is "arbitration-specific," Pet. Br. 19; see also *id.* at 34, 37, 39, 47, petitioner elsewhere concedes, as it must, that California's rule disfavoring class-action waivers applies to arbitration and litigation contracts alike, see *id.* at 28-31. (Indeed, the first decision in the *Discover Bank* line struck down a class-action waiver in a contract to *litigate*. See *Discover Bank*, 113 P.3d at 1106-1108 (discussing 2001 California case).) Petitioner thus admittedly seeks a

rule requiring courts to enforce arbitration clauses even where, as here, state contract law would bar an analogous agreement to litigate. In short, dissatisfied with the equal treatment that § 2 ensures, petitioner asks this Court to cloak arbitration clauses in a special immunity from contract law defenses that apply to other, non-arbitration contracts. Petitioner offers two arguments in support of this unprecedented rule, both of which fail.

1. Initially, petitioner contends that arbitration clauses enjoy a special immunity from state contract law—even generally applicable law—when that law affects arbitration *procedure*. See Pet. Br. 16, 25-26. But that is absurd. On its face, the saving clause in § 2 exempts generally applicable contract law—not generally applicable contract law "that has no effect on arbitration procedure." And if petitioner were correct, it would mean, paradoxically, that contract doctrines prohibiting the enforcement of some arbitration clauses altogether would survive preemption, while defenses (like the one challenged here) that permit arbitration but place some limits on its practice would be preempted.

Petitioner's argument also proves far too much. If state contract law were preempted whenever it affected arbitration procedure, enforcement of even the most blatantly unfair arbitration agreements would follow. For example, the FAA would displace state public policy bans on gambling contracts, which would otherwise void agreements to resolve future disputes by having the arbitrator flip a coin. Less fantastically, the Act would preempt the routine application of state law to void clauses requiring clearly one-sided arbitration

procedures. See, *e.g.*, *Ferguson v. Countywide Credit Indus., Inc.*, 298 F.3d 778, 786-787 (9th Cir. 2002) (discovery provisions in arbitration agreement that favor defendant at plaintiff's expense support unconscionability holding); *Burch v. Second Judicial Dist. Ct.*, 49 P.3d 647, 650-651 (Nev. 2002) (contract permitting selection of potentially biased arbitrator unconscionable); *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1243-1244 (Mont. 1998) (contract requiring arbitration in distant forum void as contrary to public policy). In short, petitioner's claim that contracts involving arbitration procedure are somehow exempt from § 2's saving clause defies both the plain language of that section and common sense.

2. Petitioner's next tack is to claim that the only state law that survives preemption under § 2 is a law that applies to all contracts, and that the *Discover Bank* rule fails this test because it applies only to contracts involving future dispute resolution. See Pet. Br. 28-31. This line of argument fails on multiple grounds.

First, a state contract doctrine that places limits on any agreement to resolve future disputes—whether by arbitration or litigation—does not violate the FAA. By treating arbitration and litigation alike, such a doctrine avoids the anachronistic judicial hostility to arbitration (relative to litigation) that the Act was meant to abolish. See *supra* Section I.A. To be sure, the FAA may preempt state-law rules that purport to apply equally to arbitration and litigation, only to invalidate arbitration agreements entirely and thereby require contracting parties to litigate—such as a rule making it unlawful to resolve any dispute other than by jury trial. See Pet. Br. 41. But even if petitioner is correct that fewer parties

will choose to arbitrate if it means using class arbitration, see *id.* at 55-56, this does not change the fact that class arbitration is a well-recognized means of resolving disputes, and a rule voiding certain class-action waivers does not compel the contracting parties to litigate.[2] See *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (recognizing that parties may contract for class arbitration); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality op.) (question whether parties contracted for class arbitration does not implicate "the validity of the arbitration clause"); *id.* at 454-455 (Stevens, *J.*, concurring in the judgment and dissenting in part) (FAA does not "preclude[]" agreement for class arbitration); American Arbitration Association, Supplementary Rules for Class Arbitrations (as effective

[2] As for petitioner's contention that forum-selection clauses were unenforceable in the early Twentieth Century because they operated to "oust" a court of jurisdiction, Pet. Br. 30, the FAA's principal drafter and public advocate used the fact that these clauses *were* enforceable to argue that arbitration clauses should receive the same treatment. See Julius Henry Cohen, *Commercial Arbitration & the Law* 16-17 (1918) ("There is strong authority, also, as we shall presently find, for the legal proposition that parties may select the courts in which the case is to be tried in the event of controversy between them. Though this has been controverted, much the better authority supports this view.").

Oct. 8, 2003);[3] JAMS Class Action Procedures (as effective May 1, 2009).[4]

Second, even if petitioner were correct that use of the word "any" in § 2 means that a state contract doctrine survives preemption only if it applies across the board to all contracts, see Pet. Br. 28, California's *Discover Bank* rule satisfies that standard, just as similar rules in place across the country do. The unconscionability and public policy doctrines apply to "any" contract, not just those involving the resolution of future disputes—although, like other contract doctrines, they evolve over time and apply differently depending on the nature of the parties and the substance of their agreement. See *infra* pp. 19-21. Petitioner objects merely to the way California law applies these doctrines to class-action waivers, which by nature appear only in contracts involving future dispute resolution.

Indeed, although "unconscionability" had yet to become a term of art, the FAA's drafter recognized that, under the statute he favored and ultimately obtained, courts could void inequitable arbitration clauses like any other unfair contract provision: "when the parties do not stand on equal terms, *the aid of a Court of Equity can always be had, as in any other case of contract.*" Cohen, *supra*, at 232 (quotation marks omitted)

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[3] These rules are available at http://www.adr.org/sp.asp?id=21936.

[4] These rules are available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures_2009.pdf.

(emphasis in original). And this Court identified unconscionability as an example of a generally applicable contract defense that survives preemption under § 2's saving clause. See *Casarotto*, 517 U.S. at 687. It is unimaginable that—as petitioner must presume—*Casarotto* had in mind a unique brand of unconscionability that neither evolves over time nor develops specific rules geared toward particular classes of contract.

In the end, to prevail, petitioner must explain why the *Discover Bank* rule is not what it purports to be—the application of general contract law doctrines to a specific type of agreement. More than that, petitioner must identify some principle by which federal courts can distinguish between a legitimate application of state law and the sort of illegitimate, or "idiosyncratic" application that petitioner insists is preempted. Pet. Br. 43. Petitioner offers none, and any conceivable principle would be unworkable in practice and represent an unprecedented federal intrusion into state common law.

2. Petitioner's Proposed Rule Would Require Federal Courts To Undertake A Standardless Reexamination Of State Contract Law.

Rather than a straightforward, easily administered rule prohibiting state law from discriminating against contracts to arbitrate, petitioner asks federal courts to second-guess state court decisions in the development and application of state contract law. Petitioner's brief illustrates the inquiry that petitioner envisions—one in which federal courts review the long histories of state

law doctrines, after which judges endeavor to draw their own, independent conclusions as to whether a doctrine represents a "new rule" that "distort[s]" contract law, or whether instead it represents the "refinement" of an existing rule. Pet. Br. 19, 47. Putting aside petitioner's flawed (and entirely unsupported) premise that state contract law should not evolve to create "new" rules—"unconscionability" itself did not exist as a well-defined doctrine until it appeared in the Uniform Commercial Code in the mid-Twentieth Century—it is difficult to conceive of an inquiry more destructive of the bedrock principle that the States themselves "'should utter the last word'" on questions of state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, *J.*, dissenting)).

And what criteria should courts use in deciding whether a state court's application of long-held contract doctrines to an arbitration clause is an illegitimate "new" rule or the legitimate "refinement" of an old one? In more than 11 pages detailing the history of California's unconscionability doctrine, see Pet. Br. 3-4, 32-39, 43-44, petitioner offers no administrable rule in answer to this question. And none is readily apparent.

1. It cannot be, as petitioner implies, that whether the FAA preempts an application of state contract doctrine turns on whether—in a federal court's estimation—that application squares with certain abstract elements central to that doctrine. Indeed, such a rule is all but impossible to apply to a doctrine like unconscionability, whose equitable precursors "defy[] precise formulation." E. Allen Farnsworth, Contracts

§ 4.27, at 305 (3d ed. 1999). Indeed, although unconscionability first appeared as part of the Uniform Commercial Code, "[n]owhere among the Code's many definitions is there one of unconscionability," for in the end "the term is undefinable," *id.* at § 4.28, at 310. Rather, "[t]he determination that a contract or term is or is not unconscionable is made in light of its setting, purpose and effect." Restatement (Second) of Contracts § 208 cmt. a (1981).

Likewise, "public policy," though a centuries-old basis for denying enforcement in contract, is constantly evolving. "[P]olicies vary over time," and "[a]s the interests of society change, courts are called upon to recognize new policies, while established policies become obsolete or are comprehensively dealt with by legislation." Farnsworth, *supra*, § 5.2, at 327. As a Member of this Court put it more than a century ago, "[t]he standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interest, at a more advanced stage are treated as legal and binding." *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 233-234 (1892) (statement of Brown, *J.*). Nor is there anything "new" or "idiosyncratic" in considering aspects of both the unconscionability and public policy doctrines at once, including the commonplace rule that refuses to enforce exculpatory clauses aimed at avoiding liability for intentional misconduct. See, *e.g.*, Restatement (Second) of Contracts § 208 cmt. a (1981) (recognizing that unconscionability "also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy").

And while petitioner questions whether the public policy doctrine can ever survive preemption under § 2's saving clause—on the theory that it was "public policy" that courts invoked when they formerly singled out arbitration clauses for non-enforcement in equity, see Pet. Br. 41—this critique is nonsensical. Like all contract doctrines, the FAA prohibits use of public policy to single out arbitration clauses for disfavored treatment. See *supra* p. 12. But so long as a public policy defense does not "take[] its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry*, 482 U.S. at 492 n.9, as the old, judicial hostility did, then the defense survives preemption under § 2.

2. Nor can the test for preemption be whether a particular application or extension of state contract law was the readily predictable result of prior decisions. The question is not the degree to which state law has changed, evenly or abruptly, over time—as it may be, for example, in the takings context. See, *e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992). Again, contract law is not static, see *supra* pp. 19-20, and § 2 does not purport to make it so. Rather, proper application of its saving clause turns on whether state contract doctrines, as they change, reanimate the old judicial hostility to arbitration by singling it out for disfavored treatment.

3. This case illustrates the standardless morass into which petitioner's rule would invite federal courts. Again, the unconscionability inquiry necessarily considers context, see *supra* p. 20, and in *Discover Bank*, the California Supreme Court relied squarely on its past unconscionability and public policy decisions to reach its holding. California courts have espoused the benefits of

class-action litigation for nearly 40 years, see *Discover Bank*, 113 P.3d at 1105, and the state courts had interpreted state unconscionability and public policy doctrine to invalidate class action waivers for nearly a decade before *Discover Bank*, starting with a case involving non-class *litigation*, not arbitration, *id.* at 1106-1108. Moreover, the *Discover Bank* court carefully recited and applied longstanding California unconscionability doctrine in refusing to enforce the class-action waiver in the adhesion contract there. See *id.* at 1108.

Nor can petitioner credibly claim that California has applied its contract law idiosyncratically, for many States refuse to enforce class-action waivers under the unconscionability and/or public policy doctrines.[5] If the

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[5] See *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002) (unconscionability); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007) (unconscionability); *S.D.S. Autos, Inc. v. Chrzanowksi*, 976 So. 2d 600 (Fla. Dist. Ct. App. 2007) (public policy); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007) (unconscionability); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006) (unconscionability); *Feeney v. Dell Inc.*, 908 N.E.2d 753 (Mass. 2009) (unconscionability and public policy); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000) (unconscionability); *Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 WL 2042512 (E.D. Mich. July 20, 2006) (public policy); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005) (unconscionability); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (unconscionability); *Homa v. Am. Express Co.*, 558 F.3d 225 (3d Cir. 2009) (New Jersey) (unconscionability); *Cohen v. Chase Bank, N.A.*, 679 F. Supp. 2d 582 (D.N.J. 2010) (public policy); *Fiser v. Dell Computer*

California courts have departed wildly from contract law traditions in disfavoring adhesive class-action waivers, then so have state and federal courts around the country.

In the end, petitioner asks federal courts to undertake a searching, but ultimately standardless, review of decades of state contract law on myriad common law doctrines– from capacity, to fraud in the inducement, to consideration, to unconscionability and public policy—and then to make a subjective determination on the legitimacy of decisions applying those doctrines to arbitration clauses. Nothing would do more violence to the assurance that, if enacted, the FAA would mean "no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws." *1924 Joint Hearing* at 37.

Corp., 188 P.3d 1215 (N.M. 2008) (unconscionability and public policy); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) (unconscionability); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004) (public policy); *Schwartz v. Alltel Corp.*, No. 86810, 2006 WL 2243649 (Ohio Ct. App. June 29, 2006) (unconscionability); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. Ct. App. 2007) (unconscionability); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) (unconscionability); *Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010) (unconscionability and public policy); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (unconscionability and public policy); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) (unconscionability); *Cottonwood Fin., Ltd. v. Estes*, 784 N.W.2d 726 (Wis. Ct. App. 2010) (unconscionability).

3. Petitioner's Proposed Rule Would Mean More, Not Less, Litigation.

The FAA sought not merely to abolish the anachronistic rule barring enforcement of agreements to arbitrate future disputes; it sought to accomplish this aim with a minimum of litigation. Sections 3 and 4 provide a mechanism for staying the litigation of disputes that should be in arbitration, and for federal courts to compel arbitration swiftly as needed. As this Court has recognized, "[t]he Arbitration Act calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983); see also Cohen & Dayton, *supra*, at 267 (sections 3 and 4 "assure a prompt, speedy and non-technical determination of the merits of the application"); *1924 Joint Hearing* at 34 (noting that these "clauses * * * assure a prompt, speedy and nontechnical determination"); H. Rep. No. 96, at 2 (1924) (procedure for enforcing arbitration agreements "is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties").

Petitioner's rule would turn this intent on its head and encourage complex, protracted federal litigation over whether a state-law contract defense is preempted. Rather than answer a relatively simple question—does the defense single out arbitration for disfavored treatment—petitioner invites federal courts to undertake an amorphous historical analysis of state contract law, an example of which occupies more than

11 pages of petitioner's brief in this Court. Even if such a rule would help petitioner win this case, it would saddle future parties with costly, needless litigation over whether to arbitrate, precisely what the FAA seeks to avoid.

II. Petitioner's "Conflict" Preemption Theory Would Displace State Law Without Any Authority From Congress.

Having failed to establish any conflict with the anti-discrimination purpose expressed in § 2 of the Act—indeed, having asked this Court to abandon that purpose for a special rule *favoring* arbitration clauses—petitioner contends, in the alternative, that there are other, unstated, objectives implicit in the Act that add to the FAA's preemptive scope. But the sweeping "conflict" preemption that petitioner asks the Court to recognize has no grounding in the Act. It amounts to nothing more than self-serving speculation about additional objectives that some Members of Congress may have hoped to achieve. The unstated objectives that petitioner invites the Court to recognize, and the wide-ranging preemption that petitioner says should follow from these supposed objectives, illustrates precisely why so many Members of this Court have questioned the brand of preemption petitioner urges here.

The "purposes and objectives" theory of conflict preemption on which petitioner relies would displace state law "to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Sci., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S.

52, 67 (1941)). But once a court gives preemptive force to perceived "purposes" beyond those that appear on the face of the Act itself—such as § 2's clear directive to treat arbitration agreements like other contracts—it runs the many risks that Members of the Court have identified. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1207-1208, 1215-1217 (2009) (Thomas, *J.*, concurring in the judgment) (suggesting that Court abandon "purposes and objectives" preemption altogether); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, *J.*, concurring in judgment in part and dissenting in part); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907-908 & n.22 (2000) (Stevens, *J.*, dissenting); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, *J.*, concurring in part and concurring in the judgment).

First, when a court expands preemption beyond what Congress expressly directs, the court risks treading on the "policy choices and value determinations constitutionally committed for resolution to the halls of Congress." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (raising same concerns about political question doctrine). "[T]he Constitution prohibits one branch [of federal government] from encroaching on the central prerogatives of another," *Miller v. French*, 530 U.S. 327, 341 (2000), and it is "the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation," *TVA v. Hill*, 437 U.S. 153, 194 (1978). "Purposes and objectives" preemption upsets this constitutional division of labor by empowering courts to "invalidat[e] state laws based on perceived conflicts with broad federal policy

objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth*, 129 S. Ct. at 1205 (Thomas, *J.*, concurring in the judgment). The doctrine thus permits "[a] free wheeling judicial inquiry into whether a state statute is in tension with federal objectives," one that "undercut[s] the principle that it is Congress rather than the courts that pre-empts state law." *Gade*, 505 U.S. at 111 (Kennedy, *J.*, concurring in part and concurring in the judgment); accord *Wyeth*, 129 S. Ct. at 1208 (Thomas, *J.*, concurring in the judgment). And it removes the power of preemption from "the hands of Congress," which is the body best "suited * * * to strike the appropriate state/federal balance." *Geier*, 529 U.S. at 907 (Stevens, *J.*, dissenting).

Second, "purposes and objectives" preemption risks unpredictable outcomes, for—beyond what appears on the face of the law itself—congressional intent may be difficult to discern. "Federal legislation is often the result of compromise between legislators and 'groups with marked but divergent interests,'" and "a statute's text might reflect a compromise between parties who wanted to pursue a particular goal to different extents." *Wyeth*, 129 S. Ct. at 1215 (Thomas, *J.*, concurring in the judgment) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002)); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (noting that "[s]tatutes are seldom crafted to pursue a single goal"). Preempting state law without any clear authority from Congress thus "risks upsetting the legislative bargains out of which the statutes were hammered." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 280 (2000). And it "leaves Congress, regulated industries, and consumers to guess at whether untested federal laws

have displaced state [law]." Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption Against Preemption,"* 84 Tul. L. Rev. 1185, 1187 (2010).

Petitioner's "conflict" preemption theory exemplifies these risks. Petitioner attributes several self-serving "purposes" to Congress—ensuring enforcement of arbitration agreements "in accordance with their terms," "allowing parties to select their own dispute-resolution procedures," and "removing impediments to arbitration." Pet. Br. 24, 49, 53. But unlike the anti-discrimination command in § 2, not one of these supposed goals appears anywhere in the Act itself. Petitioner's proposed rule would not only read them into the Act, but would use them to displace critical state laws, including contract defenses that protect residents from predatory or unfair treatment. See *supra* p. 23. And because the States had no notice that the FAA would preempt swaths of their contract law—indeed, they were assured otherwise, see *supra* pp. 10-12—petitioner's rule guts the "effectiveness of the federal political process in preserving the States' interests." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

Petitioner acknowledges but tries to brush aside concerns over its preemption theory. See Pet. Br. 48-49 n.15 (arguing that "[t]he conflict-preemption argument here is not based on 'generalized notions of congressional purpose'" and thus is not cause for "skepticism"). But this effort fails. Most obviously, petitioner is wrong to suggest that Justice Thomas in *Wyeth* rejected only those applications of "purposes and objectives" preemption that "wander far from the statutory text," while otherwise reaffirming the

doctrine. *Id.* at 48 n.15 (internal quotations omitted). In fact, Justice Thomas stated that "[t]his Court's entire body of 'purposes and objectives' pre-emption jurisprudence is inherently flawed," and he would reject the doctrine as a whole. 129 S. Ct. at 1211 (Thomas, *J.*, concurring in the judgment). In any event, as explained, petitioner's claim that its "conflict" preemption argument is "firmly rooted in the text and structure" of the FAA, Pet. Br. 48 n.15 (internal quotations omitted), is belied by the text of the Act itself.

III. Class Actions Bolster Government Efforts To Protect Consumers.

Finally, petitioner and its *amici* attempt to downplay the importance of class litigation to public policy in the States, but this line of argument presumes that government enforcement power is unlimited, and it ignores the role consciously left to private litigants in deterring and remedying misconduct. Although government plays the primary role in enforcing consumer-protection laws, private, class litigation is an effective complement to government efforts to obtain relief for consumers injured by fraud or sharp dealing, particularly where the prospect of small damage awards makes it "uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); see also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) ("It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action."). Class litigation also serves to notify victims who might not know they have been injured, educate the public about

questionable business activities and practices, deter wrongdoing, and bring patterns of misconduct to light. See 2 Newberg on Class Actions §§ 5.49, 5.51, at 467-469, 470-472 (4th ed. 2002).

Ignoring these substantial benefits, petitioner and its *amici* argue that class-wide proceedings are unnecessary because government enforcement of federal and state consumer-protection laws adequately defends consumers against abusive business practices. See Pet. Br. 45-46; Brief of *Amicus Curiae* American Bankers Association, *et al.* ("Bankers Br.") 26-29; Brief for *Amici Curiae* the States of South Carolina and Utah 4-6. But while government efforts to protect consumers are substantial, class litigation is an important element of the enforcement scheme. As this Court recognized:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

Often, federal and state laws openly encourage private class-action litigation as a supplement to public enforcement. "Whereas some countries choose to enforce their laws by establishing large and powerful government bureaucracies, the United States has

generally taken a different approach." Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 Law & Contemp. Probs. 75, 98 (2004). This country's consumer-protection agencies tend to be "small * * * compared to those of other nations, such as many European countries," government instead relying on affected individuals to bring their own lawsuits as "private attorneys general." *Ibid.* Accordingly, federal and state consumer-protection laws often authorize private individual and class litigation, as well as government enforcement, employing class actions as a way to "enhance[] the private attorney general legislative objective." 2 Newberg, *supra*, at 469.

The federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*—"[t]he most voluminous source of class actions in the area of consumer credit," 6 Newberg, *supra*, at 380—is a prime example of this combined approach. To further its mandate that consumers receive "meaningful disclosure of credit terms," TILA authorizes enforcement by designated federal agencies and state attorneys general. 15 U.S.C. §§ 1601(a), 1607, 1640(e). It also creates an "[i]ndividual and class action for damages" against "any creditor who fails to comply with any requirement imposed" by the statute. *Id.* § 1640(a). Thus, the statute "create[s] a system of private attorneys general to aid its enforcement." *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); accord *de Jesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 234 (1st Cir. 1990); *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037,

1040 (6th Cir. 1984); *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982).[6]

The importance of class litigation to Congress' enforcement scheme is evident from TILA's text and legislative history. Although the law dates from 1968, Congress amended it to authorize private class actions in 1974 "to counter the manifest judicial unwillingness to impose class liability under the Act," *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 400 (6th Cir. 1980), and to add "'an important encouragement to the voluntary compliance which is so necessary to insure nation-wide adherence to uniform disclosure,'" *id.* at 400-401 n.6 (quoting S. Rep. No. 93-278, at 14-15 (1973)); accord *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1338 (11th Cir. 2000) ("the legislative history of § 1640 shows that Congress thought class actions were a significant means of achieving compliance with the TILA"). Since 1974, Congress has twice raised the maximum dollar ceiling on TILA class action recoveries—from $100,000 (or 1% of the net worth of the creditor) to $500,000 in 1976 and, in July 2010, to $1 million. See 15 U.S.C. § 1640 (as amended

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[6] Other federal consumer-protection statutes similarly authorize class actions notwithstanding the availability of federal and state government enforcement, reflecting Congress' conclusion that the addition of class litigation promotes consumer protection. See, *e.g.*, 15 U.S.C. § 1679g(a)(2)(b) (Credit Repair Organizations Act); 15 U.S.C. § 1691e(a)-(b) (Equal Credit Opportunity Act); 15 U.S.C. § 1692k(a)(2)(B) (Fair Debt Collection Practices Act); 15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfers Act); see also 6 Newberg, *supra*, at 386-393 (collecting sources of class action litigation in consumer protection area).

by Pub. L. No. 94-240, 90 Stat. 257); Dodd-Frank Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376, § 1416.

The legislative history to the 1976 TILA amendments likewise shows "that Congress wished to encourage Truth-in-Lending class actions." *Watkins*, 618 F.2d at 401. That history describes Congress' concern that if the ceiling on TILA class recoveries "'is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized.'" *Id.* at 401 & n.7 (quoting S. Rep. No. 94-590, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 438). Congress' decision earlier this year to double the maximum TILA class-action recovery, while simultaneously expanding federal and state enforcement authority, see Dodd-Frank Act §§ 1416, 1422, further confirms that class actions are an important supplement to government enforcement efforts under the TILA.

Even decisions cited by petitioner's *amici* recognize that "Congress contemplated class actions as a part of the TILA enforcement scheme," and "that class actions were self-consciously promoted by Congress in amending the statute." *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); accord *Gay v. CreditInform*, 511 F.3d 369, 380 (3d Cir. 2007); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 817 (11th Cir. 2001) (all cited at Bankers' Br. 21).[7] As

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[7] To be sure, these cases reject the view that federal consumer-protection statutes, including TILA, "create an unwaivable right to bring a class action." *Johnson*, 225 F.3d at 377; accord *Randolph*, 244 F.3d at 817-818. But they do

courts consistently have recognized, "a class action is an available, important means of remedying violations of" consumer-protection statutes, including TILA. *Bowen*, 233 F.3d at 1337, because "the small amounts of money involved and the difficult financial situations of many of the litigants may inhibit individualized litigation." *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000).

Like the federal government, States have a variety of consumer-protection laws recognizing the importance of class actions. Every State has a statute prohibiting unfair and deceptive acts and practices ("UDAP") enforceable by the state attorney general and by private litigation, often private class litigation. See Mark E. Budnitz, *The Federalization & Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation & Enforcement*, 24 Ga. St. U. L. Rev. 663, 674 (2008). Thirteen States and the District of Columbia explicitly authorize consumer class actions on the face of their UDAP laws.[8] In other States, courts

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not question that a class-action waiver included in an arbitration clause may be set aside if unconscionable under state law. See, *e.g.*, *Gay*, 511 F.3d at 394-395 (discussing Credit Repair Organizations Act, 15 U.S.C. § 1679); *Johnson*, 225 F.3d at 378 n.5 (discussing TILA).

[8] See Cal. Civ. Code § 1781 (2009); Conn. Gen. Stat. Ann. § 42-110g(b) (2010); D.C. Code § 28-3905(k)(1)(E) (2010); Idaho Code Ann. § 48-608(1) (2010); Ind. Code Ann. § 24-5-0.5-4(b) (2010); Kan. Stat. Ann. § 50-634(c) (2010); Mass. Gen. Laws Ann. ch. 93A, § 9(2) (2010); Mich. Comp. Laws Ann. § 445.911(3) (2010); Mo. Ann. Stat. § 407.025(2) (2010); N.H. Rev. Stat. Ann. § 358-A:10-a (2010); N.M. Stat.

have construed UDAP statutes to authorize class litigation.[9] By contrast, only six state UDAP acts expressly prohibit consumer class actions.[10]

In short, federal and state consumer protection laws assume that private litigation, including class litigation, will work in tandem with regulatory action to protect consumers. The claim that potential government enforcement eliminates any need for class litigation ignores this design and presumes away the practical limits on government's enforcement power. Like federal regulators, state officials have limited resources and myriad competing duties. Indeed, contrary to the suggestion of petitioner's *amici*, see Bankers Br. 23-24 (noting California Public Utility Commission's enforcement authority), state utility commissions have restricted (if any) ability to regulate wireless phone service providers, having been discouraged from

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Ann. § 57-12-10(E) (2010); Ohio Rev. Code Ann. § 1345.09(B) (2010); R.I. Gen. Laws § 6-13.1-5.2(b) (2009); Wyo. Stat. Ann. § 40-12-108(b) (2010).

[9] See, *e.g.*, *W.S. Badcock Corp. v. Myers*, 696 So. 2d 776, 779-780 (Fla. Dist. Ct. App. 1996); *Brooks v. Midas-Int'l Corp.*, 361 N.E.2d 815, 819-820 (Ill. App. Ct. 1977); *Olive v. Graceland Sales Corp.*, 293 A.2d 658, 659-662 (N.J. 1972); *Burns v. Volkswagen of Am., Inc.*, 460 N.Y.S.2d 410, 413 (N.Y. Sup. Ct. 1982); *Mahoney v. Capp*, 638 S.W.2d 257, 261 (Tex. App. 1982); *Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 242-243 (Wash. Ct. App. 2000).

[10] See Ala. Code § 8-19-10(f) (2010); Ga. Code Ann. § 10-1-399(a) (2010); La. Rev. Stat. Ann. § 51:1409(A) (2009); Miss. Code Ann. § 75-24-15(4) (2009); Mont. Code Ann. § 30-14-133(1) (2009); S.C. Code Ann. § 39-5-140(a) (2009).

exercising regulatory oversight by uncertainty regarding the scope of federal preemption and made wary of the legal costs they will incur if challenged by industry. See GAO, *FCC Needs to Improve Oversight of Wireless Phone Service*, GAO-10-34 (Nov. 2009) 30-31, 33-37.[11]

And although state attorneys general actively enforce consumer-protection laws, a recent survey of state and local consumer agencies shows that many have suffered substantial budget cuts in recent years. See Consumer Federation of America, *et al.*, 2009 Consumer Complaint Survey Report (July 27, 2010), at 3 (71% of responding agencies reported budget cuts in 2009, compared to 47% in 2008).[12] These cuts resulted in staff reductions, elimination of programs, reduced training opportunities, and even wholesale agency closings. See *id.* at 3-5, 36-37. At the same time that state and local consumer protection agencies saw their resources reduced, many reported receiving a significantly increased number of consumer complaints. See *id.* at 5 (58% of responding agencies reported increase in complaints, averaging 23% per agency but in some cases as high as 62%). These reductions in resources provide further confirmation that private class litigation remains a crucial component of consumer-protection efforts.

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[11] The GAO Report is available at http://www.gao.gov/new.items/d1034.pdf.

[12] The report is available at http://www.consumerfed.org/elements/www.consumerfed.org/file/Consumer_Complaint_Survey_Report072009.pdf.

Petitioner thus is wrong to suggest that the California Supreme Court was merely "speculat[ing]," Pet. Br. 45, when it concluded that government regulatory enforcement alone is not always sufficient to fully safeguard consumers from fraudulent and deceitful business practices. But petitioner's reliance on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), for its "speculation" argument, Pet. Br. 45-46, is misplaced for another reason. That decision, which did not address FAA preemption (and left open a challenge to a class-action waiver in an arbitration agreement, see *Randolph*, 531 U.S. at 92 n.7), merely concluded that a party seeking to invalidate an arbitration agreement on the ground that arbitration would be too costly must provide some evidence that proceeding under the contract would preclude her from vindicating her rights, see *id.* at 91-92. But no such evidence is needed here. Because many small-claims victims will not even know they have been injured without class litigation, there is no question that rights will go unvindicated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,

v.

VINCENT and LIZA CONCEPCION
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JONATHAN C. KALTWASSER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS[1]

Jonathan C. Kaltwasser is the class representative in *Kaltwasser v. Cingular Wireless*, LLC, 2009 WL 3157688 (9th Cir. Oct. 01, 2009), which was joined for purposes of oral argument below with the instant case. Undersigned counsel argued Kaltwasser's suit in the consolidated oral arguments before the Ninth Circuit. Kaltwasser represents a class of consumers that includes persons with the same form of AT&T Moblility, Inc. ("ATTM") contract as the one at issue in this appeal. Thus, the legal issues raised in the instant suit are similarly applicable to Kaltwasser's suit. Given Kaltwasser's personal and representative stake in the outcome of this case, he has a strong interest in the Court affirming the Ninth Circuit.

SUMMARY OF THE ARGUMENT

ATTM urges this Court to find that the Federal Arbitration Act ("FAA") preempts the lower court's rulings. However, in making its preemption arguments, ATTM incorrectly presumes that the Ninth Circuit (and the District Court) determined that ATTM's class action waiver was *per se*

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no person or entity other than amicus curiae and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored this brief in whole or in part. The parties have consented to the filing of this brief.

unconscionable, invalidated AT&TM's arbitration clause on that basis, and therefore discriminated against arbitration which the FAA was designed to prevent. In fact, the lower courts did none of these things. The Ninth Circuit (and the District Court) actually made very limited rulings. Specifically, the lower courts found the unrelated class action waiver unconscionable in this specific case based on generally applicable contract law. In doing so, the lower courts articulated no *per se* rules concerning class action waivers and unconscionability. They instead proceeded through an individualized analysis of the case, paying special attention to the particulars of this agreement, including AT&TM's "favorable" arbitration "premiums." The District Court examined the specific terms of the arbitration agreement, in turn, praising portions of it along the way, in an effort to uphold the agreement. In the end, the lower courts found that in the context of this case AT&TMs "premiums" were largely illusory and found they did not transform a small claim (usually less than $30) into one that was reasonably feasible for an individual to bring, even in an arbitration.

The lower courts then struck the arbitration clause only because AT&TM put a specific provision in its agreement that mandated that the entire arbitration clause was to be deemed void if the class action waiver was voided (hereafter referred to as the "self-destruct" clause). California law is clear that in absence of AT&TM's self-destruct clause the agreement to arbitrate would have been enforced just without the unconscionable class action waiver.

This means the lower courts enforced the provisions at issue that address what the FAA is designed to protect – the parties ability to agree to arbitrate or not. That the lower courts found unconscionable an unrelated class action waiver provision does not run afoul of the FAA's central purpose.

The FAA is an anti-discrimination statute that requires courts to assure equal enforcement of arbitration agreements as that afforded any other contract between the parties. The FAA did not federalize contract law, which its express savings clause for state contract laws of general applicability in Section 2 makes clear. Rather, the FAA set a federal policy of placing arbitration agreements on par with other contracts. The statute was intended to fit arbitration agreements into state contract law. Its purpose was not to preclude enforcement of state law contractual rights if they are drafted inside the heading "Arbitration Agreement" as ATTM urges.

The FAA instead protects the rights of parties to submit disputes to arbitration rather than litigation. Its scope therefore only concerns the question of whether to arbitrate or not to arbitrate. Because the Ninth Circuit's opinion did not discriminate against the parties' legitimate choice to arbitrate or not to arbitrate, the decision should be affirmed.

ATTM's attempt to tie the class action waiver to the agreement to arbitrate by its self-destruct clause does not transform an otherwise unrelated

provision into one the FAA is designed to protect. If it did, then all a party would need to do is tie any right or covenant within the agreement to the agreement to arbitrate to secure FAA protection of that term and to take it out of the realm of state unconscionability and other state contract laws of general applicability. Such would render the FAA's express savings clause in Section 2 preserving generally applicable state contract laws nothing more than a nullity, which is clearly contrary to the FAA's express purpose.

ATTM further attempts to color this case by incorrectly claiming that California's generally applicable unconscionability law with respect to class action waivers is out of step with other states and creates an effective ban on class action waivers. However, none of these things are so.

In fact, California has no categorical rule prohibiting class action waivers in contracts; only in cases where the waiver serves as an exculpatory clause is the waiver void due to unconscionability. The vast majority of state courts, and federal courts applying state law, have under rules similar to California's found certain provisions within arbitration agreements, such as class action waivers, to be unconscionable.

Further, the lower courts simply held that a term involving a class action waiver in the dispute between Concepcion and ATTM was unconscionable. It passed no judgment on the arbitration agreement and made no *per se* rule that the class action waiver

was unconscionable in all instances. Indeed, California courts have upheld class action waivers under different facts, and would presumably have done so if the facts of Concepcion's case were different. The only reason the entire arbitration agreement was invalidated here was the self-destruct clause AT&TM placed within the agreement. Since AT&TM required in its contract that the arbitration agreement not be enforced if the class action waiver was found unconscionable, it cannot lay the blame for lack of enforcement of its arbitration agreement on judicial animus towards arbitration.

Nor should AT&TM's attempt to discount the class action right as merely procedural be accepted. Indeed, AT&TM incorrectly made this a predicate of the certified question it posed to this Court. In fact, California statutes make the right to bring a class action a substantive right. Likewise, California public policy treats the right to bring a dispute as a class action as an important right.

When AT&TM's incorrect premises are cast aside and the actual facts, law and application thereof by the courts below are considered, neither the Ninth Circuit nor the District Court ran afoul of the FAA. They instead acted in accord with the purpose of the FAA and properly applied generally applicable state contract law as the FAA expressly permits. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE NINTH CIRCUIT DID NOT INVALIDATE ATTM'S ARBITRATION AGREEMENT OR VOID ITS CLASS ACTION WAIVER IN ALL INSTANCES AS ATTM ARGUES.

ATTM posits its preemption arguments as if the Ninth Circuit (and the District Court) determined ATTM's class action waiver was *per se* unconscionable, invalidated ATTM's arbitration clause on that basis, and therefore discriminated against arbitration which the FAA was designed to prevent. In fact, the lower courts did none of these things.

First, the Ninth Circuit held that under the particular circumstances in the case at bar the class action waiver was unconscionable. The chief consideration of the Ninth Circuit in reaching this conclusion was that Concepcion's claim was for $30.00, that ATTM's alleged "favorable terms" for individual arbitration were not sufficient to make a $30.00 claim reasonably feasible for an individual to bring, and therefore in that specific context the class action waiver was unconscionable. In so holding, the Ninth Circuit did not invalidate the class action waiver for all purposes as ATTM intimates. Rather, it merely applied generally applicable principles of unconscionability under California law to the specific facts of the case presented. This is what the FAA's savings clause expressly preserves. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

Second, the Ninth Circuit struck the arbitration clause only because AT&TM put a specific self-destruct clause in its agreement that mandated that the entire arbitration provision was to be deemed void if the class action waiver was voided. In short, the Ninth Circuit voided the arbitration provision because it was following the express terms of the agreement that AT&TM wrote. Absent AT&TM's "self-destruct" clause, the Ninth Circuit would have found the class action waiver unconscionable for Concepcion's particular case and sent the matter to arbitration for the arbitrator to determine if a class was certifiable in this instant case and to resolve the merits of Concepcion's claim. Indeed, that is precisely how the Ninth Circuit has handled unconscionable class action waivers with arbitration agreements that did not have AT&TM's self-destruct clause. *See Gentry v. Superior Court of Los Angeles County*, 42 Cal.4th 443, 466 (2007)("Generally speaking, when an arbitration agreement contains a single term in violation of public policy, that term will be severed and the rest of the arbitration agreement enforced."); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000)(found unconscionable portion of arbitration agreement that did not provided minimum protections for unwaivable rights and enforced remainder of arbitration agreement).

AT&TM's attempt to cast this case as one where the Ninth Circuit made a blanket prohibition of class action waivers and of arbitration is simply untrue. When viewed in the true light of what the Ninth Circuit actually did, it is abundantly clear that it not

only followed applicable law, but it did not discriminate against arbitration, and instead actually favored arbitration by giving ATTM the benefit of every favorable inference for arbitration in its unconscionability analysis. Since the FAA was designed solely to prevent discrimination against the parties' right to agree to arbitrate, the Ninth Circuit's decision is not contrary to the FAA. Thus, there is no basis to find FAA preemption here since the Ninth Circuit's conduct is not contrary to the FAA.

A. The Ninth Circuit Narrowly HeldThe Class Action Waiver Was Unconscionable Under The Particular Circumstances Of The Case, And Merely Enforced The Agreement's Express Clause Requiring The Arbitration Provision Be Voided In That Event.

A close reading of the lower courts' opinions shows that the courts did not invalidate the arbitration agreement, much less discriminate against arbitration. Rather, ATTM had an agreement to arbitrate into which it inserted an unrelated class action waiver coupled with a self-destruct clause that expressly conditioned the validity of the entire arbitration agreement on the enforcement of the waiver. The lower courts found the unrelated class action waiver unconscionable in this specific case based on generally applicable contract law. The courts then enforced ATTM's self-destruct clause and voided the arbitration agreement. California law is clear that in the

absence of AT&TM's self-destruct clause the agreement to arbitrate would have been enforced just without the unconscionable class action waiver.

This means the lower courts enforced the only two provisions at issue that address what the FAA is designed to protect – the parties ability to agree to arbitrate or not. That the lower courts found unconscionable a third unrelated class action waiver provision does not run afoul of the FAA's central purpose. AT&TM's attempt to tie the class action waiver to the agreement to arbitrate by its self-destruct clause does not transform an otherwise unrelated provision into one the FAA is designed to protect. If it did, then all a party would need to do is tie any right or covenant within the agreement to the agreement to arbitrate to secure FAA protection of that term and to take it out of the realm of state unconscionability and other state contract laws of general applicability. Such would render the FAA's express savings clause a nullity and is clearly contrary to the FAA's express purpose.

1) The Agreement to Arbitrate

As a back drop, it must be noted that the agreement in question was a contract of adhesion, written by AT&TM and presented to the consumers here without any opportunity for negotiation or amendment. *See Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255 at *9 (S.D. Cal. 2008). This means AT&TM was in full control of the provisions at issue.

Though AT&TM placed several sections under the rubric "Arbitration Agreement," only the first section contains the three provisions at issue here. In that first section, only subsections 1-5 and 7 can properly be classified as being part of the agreement to arbitrate. Pet. Cert. 57a. Collectively, they comprise the first of the three provisions at issue – the agreement to arbitrate.

Subsection 1 of the Arbitration Agreement provides that claims between AT&TM and the consumer will be submitted to arbitration. *Id.* at 57a-58a. Subsection 2 provides the initial procedures for how either party must proceed in order to initiate arbitration, including relevant forms and contact information. *Id.* at 58a. Subsection 3 provides the organization through whom arbitration will be conducted and the procedures that will govern. *Id.* at 59a-60a. Subsection 4 describes the so-called "premium" payment provision, wherein if the consumer has a claim that is less than $7,500 and, after initiating and proceeding with a significant portion of the arbitration procedure but before choosing the arbitrator, AT&TM makes a written offer that is less than the eventual arbitration award, AT&TM will pay the consumer $7,500 and double attorneys' fees for the consumer's attorney. *Id.* at 60a-61a. Subsection 5 further clarifies the terms under which attorneys' fees may be recovered. Subsection 7 provides that the consumer may reject subsequent changes made to the arbitration agreement. *Id.* at 61a-62a. Subsections 1-5 and 7 combined properly comprise the entirety of the arbitration agreement.

2) The Class Action Waiver Provision

ATTM tacked Subsection 6 onto the Arbitration Agreement, but it actually cannot be said to be encompassed on agreement to arbitrate or not. The first part of Subsection 6 reads:

> (6) The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by the party's individual claim. YOU AND CINGULAR AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and Cingular agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding...

Id. at 61a (emphasis in original).

This first portion of subsection 6 is a class action waiver provision. This waiver is separate and distinct from the arbitration agreement because it does not concern the forum in which the claim will be

heard. An arbitration clause is merely a "subset" of forum selection clauses. See e.g. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 533, 534 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). The class action waiver is independent of the agreement to arbitrate, and instead represents the waiver of a substantive right that can easily remain in the arbitration context. A class action is not mutually exclusive of arbitration; the two can be combined quite easily. California has long promoted class arbitration. *see Keating v. Superior Court of Alameda County*, 31 Cal.3d 584 (1982), reversed in part on other grounds sub nom. *Southland Corp. v. Keating*, 104 S.Ct. 852 (1984). Moreover, the AAA—the organization AT&TM chose to conduct its arbitration—has guidelines and procedures that permit and govern class arbitrations. Available at: http://www.adr.org/sp.asp?id=21936.

Had this been the entirety of the arbitration clause, then the court would likely have proceeded as it did in *Armendariz*, 24 Cal.4th 83. In *Armendariz*, the court of appeals held that a provision that did not provide certain minimum protections for unwaivable rights in an employment arbitration agreement was unconscionable, so it severed the provision from the contract, but enforced the remainder of the arbitration agreement. *See also Fittante v. Palm Springs Motors, Inc.*, 105 Cal.App.4th 708 (2003) (court severed unconscionable appeals clause from the remainder of the arbitration agreement and compelled arbitration). As the California Supreme Court more recently acknowledged, "Generally speaking, when an arbitration agreement contains a single term in violation of public policy, that term

will be severed and the rest of the arbitration agreement enforced." *Gentry*, 42 Cal.4th 443, 466.

3) AT&TM's Self-Destruct Clause

The third provision that AT&TM has tried to characterize as being part of the arbitration agreement, but in substance stands aside, is the statement that purports to invalidate the entire arbitration agreement if the class action waiver is not enforced. The last sentence of subsection 6 reads:

> *If this specific proviso is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.*

Pet Cert 61a (emphasis added).

AT&TM complains that the District Court discriminates against arbitration agreements, and as evidence of such discrimination it points to the District Court's invalidating the arbitration agreement in the instant case. However, the District Court here was doing little more than honoring the language of the contract that AT&TM wrote, which required nullification of the entire arbitration provision if the class action waiver provision was unenforceable.

AT&TM's inclusion of this self-destruct clause shows it suspected that in certain instances its class action waiver would be found unconscionable, and it chose to condition the enforcement of the arbitration

agreement on whether or not the proviso was enforced. Through the insertion of this provision, ATTM has placed the courts in an untenable position. Had the District Court enforced the arbitration agreement after finding the class action waiver unconscionable, ATTM would now be arguing that the District Court ignored the intent of the parties and is not enforcing the contract as written.

But for this clause in the contract, the Court's holding would not have necessitated the invalidation of the entire arbitration clause. The court's holding was merely that in the specific context of the Concepcions' small-dollar claim there must be included in this agreement a route that preserves the important benefits of class action arbitration or litigation. *Laster,* 2008 WL 5216255 at *14 (S.D. Cal. Aug. 11, 2008).

ATTM revised the arbitration agreement in an attempt to provide what it has argued is an adequate substitute to class action. The District Court and the Ninth Circuit considered the revised arbitration agreement in its particulars and found that the class action waiver provision, as it operated in these circumstances, was unconscionable. ATTM foresaw this possibility and chose to foreclose all options other than bi-lateral arbitration through its weaving a class action waiver and self-destruct clause into its arbitration agreement. Contracts are a matter of choice and ATTM was entitled to opt for this all-or-nothing approach. But it is factually incorrect and highly

disingenuous for ATTM to force the court's hand through the explicit terms of the contract and then complain when the Court honors those selfsame terms.[2]

B. Rather Than Discriminating Against Arbitration, The Ninth Circuit's Analysis Evinces A Favorable Disposition Towards Arbitration.

The District Court and Ninth Circuit's analyses of ATTM's contract illustrates a general preference for arbitration, rather than the discriminatory posture alleged by ATTM. The District Court did not hold that any class action waiver in an arbitration agreement is unconscionable. *See Laster v. T-Mobile USA*, Inc., 2008 WL 5216255 (S.D. Cal. 2008). The court articulated no *per se* rules concerning class action waivers and unconscionability. It instead proceeded through an individualized analysis of the case,

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[2] It is worth noting that had the self-destruct clause not been a part of the arbitration clause, class arbitration would not have been waived and the matter would have proceeded in arbitration, but that is not to say that the matter would have necessarily proceeded in arbitration as a class. An arbitrator, chosen according to the terms of the agreement, would have applied the American Arbitration Association's (AAA) class arbitration guidelines, which largely mirror those set forth in FRCP 23. Available at: http://www.adr.org/sp.asp?id=21936. Only if the arbitrator chosen by the parties found that all AAA class action requirements had been met would the dispute have proceeded in arbitration as a class.

paying special attention to the particulars of this agreement. The District Court examined the specific terms of the arbitration agreement, in turn, praising portions of it along the way, in an effort to uphold the agreement. *Id.* at *10-12.

1) The Lower Courts Considered ATTM's Purported Favorable Arbitration "Premiums" In Finding The Class Action Waiver Unconscionable In This Case.

The District Court began by examining the more generous revised arbitration agreement rather than the original agreement between the parties. *Id.* at *6-7. The Court found that the contract was one of adhesion, triggering a review of whether it was unconscionable on its face or as applied. The District Court applied the test for unconscionability under California law as addressed in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal.4th 148, 162-3 (2005).

Discover Bank test addressed the California court's concern that in certain contracts of adhesion, between parties of vastly unequal bargaining positions, where the dispute concerned very little money, the party in the superior bargaining position could use a class action waiver as a *de facto* exculpatory clause and thereby circumvent longstanding California contract law. *Discover Bank* held that:

> when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,...such waivers are unconscionable under California law and should not be enforced.

Id.

The *Discover Bank* rule does not outlaw class action waivers if the waiver provides for some "adequate substitute for the class action or arbitration mechanism," *Id.* at 162. ATTM claimed to have offered such an adequate substitute in the form of its "premium," wherein if a consumer proceeds through the entire course of arbitration and the ultimate arbitration award is greater than ATTM's last written offer prior to choosing the arbitrator, then the consumer receives $7,500 and the consumer's attorney receives double attorney fees. The District Court found to the contrary and the Ninth Circuit affirmed, holding that the "premiums" did not serve as an adequate substitute to class action or class arbitration. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855-56 (9th Cir. 2009). Though ATTM presents the "premium" as a guarantee that individuals' claims would be satisfied, the premium

was not shown to be such or to serve the same important functions of class actions.

The steps the consumer is required to go through in order to be "eligible" for the premium are worth recounting in order to show the inadequacy of the premium as a substitute for a class action or class arbitration, at least where the disputes involve low dollar amounts, such as the Concepcions', which amounted to less than $30.

First, the consumer must exhaust the options available through AT&TM's customer service. Next, the consumer must send by certified mail a written Notice of Dispute to AT&TM, detailing the nature of the dispute and the specific relief sought. Pet.Cert. 58a. If no agreement is reached between the consumer and AT&TM within 30 days, then the consumer may commence arbitration by submitting her demand and advancing the filing fee to AAA. *Id.* (AT&TM states that it will reimburse the consumer for the filing fee some time in the future, though there is nothing that details the time frame for reimbursement or whether interest is included. *Id.* at 58a-59a.). The consumer may hire counsel to aid her in the arbitration, in which case she will likely have to advance additional fees and costs. The consumer will be liable for her own attorneys' fees unless she ultimately wins in arbitration an amount greater than AT&TM's last written offer.

Following the consumer's submission demanding arbitration, AT&TM may submit its answering statement. This process of submissions

and replies may repeat itself several times. Some time after all submissions have been made, an arbitrator will be chosen. *Id.*

After the consumer has proceeded through the entire arbitration submission process, AT&TM may make written offers, the last of which is to be measured against the arbitrator's ultimate award. If, after the consumer has devoted a significant amount of "time, effort and emotional resources to pursue arbitration," and advanced arbitration costs and attorneys' fees, AT&TM makes a written offer for the full amount requested (often less than $30), then it is almost guaranteed that the $7,500 premium and double attorney fees will be foreclosed to the plaintiff. *Laster*, 2008 WL 5216255 at *10. The "premium" then serves in no way as incentive for consumers with small claims to proceed with arbitration since it is easily avoided by AT&TM's last minute offer. Nor does the "premium" address the important benefits that California courts have found are part of class action mechanisms.

2) The Lower Court's Determination That The Class Action Waiver Was Unconscionable In This Case Is In-Line With Longstanding Law On Similar Exculpatory Clauses.

The lower courts' analyses to determine whether the class action waiver amounted to an exculpatory clause was in line with longstanding

California statutory and common law that disfavors exculpatory clauses. For more than a century, contract law in California has found exculpatory clauses void as against public policy when the public interest is implicated. *See, e.g., Gardner v. Downtown Porsche Audi*, 180 Cal.App.3d 713 (1986) (exculpatory clause used by repair garage held to be void as against public policy); *Tunkl v. Regents of the University of California*, 60 Cal.2d 92 (1963) (exculpatory clause used by hospital for future negligence held to be void as against the public interest); *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal. 298 (1912) (exculpatory clause in contract with telegraph company void as against public interest).

California statutory law has similarly stated that contract clauses that serve an exculpatory function, whether directly or indirectly are void as against public policy. ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." *California Civil Code Section 1668.*) In *Tunkl*, the Supreme Court of California articulated a host of nonexclusive factors that are relevant in finding an exculpatory clause void as against public policy. *Tunkl*, 60 Cal.2d at 98-101. Factors include whether the party seeking exculpation is: the type of business that is suitable for public regulation, performs service of importance to the public, concerns a matter of practical necessity for some, generally available to the public, in a stronger bargaining position, employs a contract of

adhesion, does not negotiate terms, gaining some control over the other party. *Id.* These factors apply generally to all contracts and are applicable to a variety of terms that may be held to be exculpatory.

The state's concern regarding exculpatory clauses is no different than the concern expressed by Judge Wisdom 40 years ago, and cited with approval by the United States Supreme Court: "[T]wo concerns underlie the rejection of exculpatory agreements: that they may be produced by overweening bargaining power; and that they do not sufficiently discourage negligence." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972), *quoting In re Unterweser Reederei, Gmbh v. M/S BREMEN and Unterweser Reederei GMBH*, 428 F.2d 888, 907-908 (5th Cir. 1970) (J. Wisdom, dissenting).

AT&TM attempted to satisfy the *Discover Bank* test through the provisions added in the revised arbitration agreement that purported to provide a $7,500 premium and double attorneys' fees for small claims where the arbitrator awards the consumer more than AT&TM's last written offer. The District Court noted that AT&TM's premium provision may serve "a noble purpose, even if no customer ever actually receives it." *Laster v. T-Mobile USA*, Inc., 2008 WL 5216255 at *11 (S.D. Cal. 2008). Furthermore, the District Court found AT&TM's informal procedures that precede possible arbitration to be "quick, easy to use, and prompts full or...even excess payment to the customer *without* the need to arbitrate or litigate." *Id.* (emphasis in original). The District Court's praising of parts of AT&TM's revised process belies AT&TM's attempt to characterize the

District Court as having a knee-jerk animus against arbitration.

Following California law, the District Court concluded that ATTM's processes did not adequately protect small dollar claims and "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.*, quoting *Discover Bank*, 36 Cal.4th at 157. The problem was not whether those who proceed through the informal claim procedure, and then through the entire arbitration procedure, will eventually recover the $30 in dispute. The problem was that ATTM's processes required too much time, effort and energy for consumers with small dollar claims to invoke it.

The Ninth Circuit put this point succinctly: "[I]n the end, the premium payment provision does not transform a $30.22 case into a predictable $7,500 case...Thus, the maximum gain to a consumer for the hassle of arbitrating a $30.22 dispute is still just $30.22." *Laster v. AT&T Mobility*, 584 F.3d 849, 855-56 (9th Cir. 2009). Judge Posner has placed this notion in perspective, stating: "only a lunatic or a fanatic sues for $30." *Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Had this been a $30,000 claim rather than a claim for less than $30, the court would likely have found no unconscionability in the class action waiver, as it would have failed the third prong of the *Discover Bank* test, and would have referred the claim to arbitration consistent with ATTM's agreement.

The analysis that the lower courts performed on the arbitration agreement evinces a high regard and, indeed, preference for arbitration agreements. The courts did not simply find that the class action waiver made the arbitration agreement *per se* invalid. Rather, the courts analyzed the arbitration agreement in its particulars, providing every opportunity for the agreement to be upheld. And, as discussed above, the agreement was upheld. The lower courts only held that, in the circumstances before them, the class action waiver was unconscionable. Then, in honoring the terms of the arbitration agreement and the self-destruct clause ATTM included, the courts enforced the express self-destruct clause and solely on that basis found the entire arbitration agreement "null and void." Pet. Cert. 61a.

II. CALIFORNIA COURTS HAVE NOT CREATED A "PRACTICAL BAN" ON CONSUMER ARBITRATION AGREEMENTS.

ATTM argues that since some California courts have held particular provisions unconscionable in certain circumstances, they are creating "for all practical purposes a ban on consumer arbitration agreements." Petitioner Brief, 56. This argument is unfounded and rests on several specious premises.

First, ATTM assumes that any time an arbitration clause is invalidated, arbitration is being discriminated against. The FAA explicitly places

arbitration on equal footing as contracts, so arbitration cannot be granted *de facto* immunity against general contract analysis. *Scherk.*, 417 U.S. 506, 511 (1974). The instant case further illustrates the logical problems with this premise. Here, the lower courts simply held that a term involving a class action waiver in the dispute between Concepcion and AT&TM was unconscionable. It passed no judgment on the arbitration agreement, and the only reason the entire arbitration agreement was invalidated was the self-destruct clause AT&TM placed within the agreement. Since AT&TM required in its contract that the arbitration agreement not be enforced, it cannot lay the blame for lack of enforcement on judicial animus towards arbitration.

Second, the argument fails to account for class arbitration, which AT&TM could have included in its agreement and, by doing so, preserved the possibility of both arbitration and a class mechanism. California has a long history of promoting class arbitration as an alternative to class litigation. *See Keating*, 31 Cal.3d 584. The courts have evinced no preference for class litigation over class arbitration because the concern is not with the forum, but rather the substantive rights stemming from membership in a class.

AT&TM argues that since it believes that class arbitration would be less favorable to it than class litigation, and that it would prefer to forego all arbitration if class arbitration is an option, the courts are effectively imposing litigation at the expense of arbitration. AT&TM is comparing arbitration agreements to an ideal alternative that would be

most favorable to it, when the FAA only requires that states treat arbitration equally to the real alternative of litigation.

III. THE FAA EXTENDS PROTECTION ONLY TO THE QUESTION OF WHETHER OR NOT TO ARBITRATE

The FAA is an anti-discrimination statute that requires courts to assure equal enforcement of arbitration agreements as that afforded any other contract between the parties. The statute was intended to fit arbitration agreements into state contract law. Its purpose was not to preclude enforcement of state law contractual rights if they are drafted inside the heading "Arbitration Agreement." Because the Ninth Circuit's opinion did not discriminate against the parties' legitimate choice to arbitrate or not to arbitrate, the decision should be affirmed.

A. The FAA Is An Anti-Discrimination Statute Whose Sole Purpose Is To Ensure Parity Between Arbitration Agreements And Other Contracts.

The FAA did not federalize contract law, but rather set a federal policy of placing arbitration agreements on par with other contracts. The FAA was enacted by Congress in 1925 to remedy longstanding judicial hostility towards arbitration. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1271

(2009).[3] The purpose of the statute was to place arbitration "upon the same footing as other contracts." *Scherk.*, 417 U.S., at 511 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

Section 2 of the FAA provides both the breadth and limits of the FAA: "A written provision...to settle by arbitration a controversy... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As section 2 of the FAA makes clear, "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967). "Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987) (emphasis in original).

Contract provisions do not get a pass simply by virtue of their inclusion in arbitration agreements, but rather must be treated and honored as if they appeared in any other contract. "[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without

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[3] Some have argued that the history of supposed judicial hostility toward arbitration has been greatly exaggerated. *See Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization* 20 (1992)

contravening §2." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

The FAA is essentially an anti-discrimination statute. *See* Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 Quinnipiac L.Rev. 795, 797-98 (2006). It is in some ways analogous to "a kind of 'equal protection clause' for contracts." *Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner*, 2. This has been the view of the California Supreme Court, describing the FAA as a statute that preempts state laws that "discriminate against arbitration clauses." *Discover Bank*, 36 Cal.4th 148, 167. As an anti-discrimination statute, the federal law only preempts state law that singles out agreements to arbitrate for worse treatment than other contractual provisions. Purposeful discrimination is the touchstone of violations of anti-discrimination law, and a mere imbalance is not sufficient to show discrimination. *See Washington v. Davis*, 426 U.S. 229 (1976).

B. The FAA Concerns Only The Agreement To Submit To Arbitration, And Not All Terms And Provisions Of Arbitration.

The FAA protects the rights of parties to submit disputes to arbitration rather than litigation. Its scope only concerns the question of whether to arbitrate or not to arbitrate. The FAA does not provide a federal safe harbor to any and all contract

terms that are placed within the four corners of an arbitration agreement by virtue of the fact that the document is an arbitration agreement.

Though the FAA does not allow courts to discriminate against arbitration in favor of litigation, it also does not require the wholesale acceptance of any contract term, like the class action waiver here, simply because it is placed in an arbitration agreement. Such an interpretation of the FAA would effectively federalize contract law and sanction the use of *in terrorem* clauses. It would upset the federalist balance if the FAA effectively swallowed state contract law, and would impose a function for the FAA that was far greater than Congress intended.

"If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989)). Congress made clear its intent *not* to substantively change state contract law through the savings clause of §2 of the FAA, which leaves states free to invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The purpose was to fit arbitration agreements into existing contract law, but here ATTM is contorting the language of the statute in arguing for a federal loophole to general contract law for class action waivers.

The legislative debate preceding passage of the FAA, or perhaps lack thereof, shows that the FAA was intended to be a limited statute concerned only with ensuring that parties' intent to arbitrate be honored in the same manner that any other valid contractual agreement would be honored. The sponsor of the House bill, Representative Graham, expressed this sentiment in a floor statement. "[The FAA] creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 n. 7 (1985) (quoting legislative history).

The FAA was a relatively uncontroversial piece of legislation that could not have been attempting more. At several times during the Judiciary Committee hearings, the Chairman asked for comments by anyone opposed to the legislation. No legislator or witness said an ill word about the legislation. At the last call for opposition to the bill, the Chairman remarked that there was no opposition, and "[he] knew of no real opposition when the bill was before the Senate subcommittee at the last session." Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. Of the Comms. On the Judiciary, 68th Cong. (1924). Had the bill been intended to radically alter state contract law and upset the federalist balance, it is inconceivable that no legislator or witness would have opposed the bill in the Judiciary Committee.

Just as some contracts may have terms that are unwaivable, unconscionable, or stem from

duress, "some arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights." *Little v. Auto-Stiegler*, Inc. 29 Cal.4th 1064, 1079 (2003). If state courts were unable to analyze arbitration agreements according to the same terms that they analyze other contracts, then parties could "wholly eviscerate" state legislative and judicial intent to require certain protections in all contracts by simply harboring unsavory, illegal, and unconscionable terms in arbitration clauses. Such a holding would construe the FAA in a way that "excessively encroach[es] on the powers which Congressional policy, if not the Constitution, would reserve to the states." *Southland Corp.* 465 U.S. at 19 (Stevens, J. concurring in part and dissenting in part) quoting *Metro Industrial Painting Corp. v. Terminal Co.*, 287 F.2d 382, 386 (2nd Cir. 1961).

If the FAA were interpreted expansively to reach all issues that may possibly touch upon arbitration, then the statute would produce a result antithetical to its central purpose; it would infringe upon the parties' freedom to contract. The FAA was passed in order to protect parties' rights to contract with regards to the choice of judicial or arbitral forum. However, if the FAA is interpreted to include any provision that a party places within an arbitration agreement, then it will subsume all state contract law and principles.

State contract law is intended to protect the basic rights of parties in order to ensure a fair contract process and maintain the parties' rights to

enter into a knowing and voluntary contract. Under AT&TM's expanded interpretation of the FAA, state courts would be forced to uphold basic contract prohibitions such as liquidated damages clauses for punitive purposes or confession of judgment clauses. Similarly, state courts would be preempted from holding as unconscionable an arbitration agreement that provided death by hanging as the punishment for the losing party in a dispute, or from holding as invalid due to duress an arbitration agreement signed by one party at the point of a pistol.

If the FAA concerned anything more than the question of whether to arbitrate or not to arbitrate, then parties would essentially lose the very freedom that the FAA was intended to protect: their freedom to contract. It would also open the flood gates for the imposition of exculpatory clauses violating state law under the guise of an FAA preemption that Congress' express saving clause in the FAA and the legislative history show was never the intent of the FAA.

IV. CALIFORNIA LAW CONCERNING CLASS ACTION WAIVERS IS GENERALLY APPLICABLE AND IN LINE WITH MOST STATES.

Though this case does not require an in-depth analysis of California contract law because there were no *per se* rules concerning class action waivers and unconscionability, it is important to recognize that the California approach to class action waivers is largely in line with a majority of states. Furthermore, California treats the right to class

action as a substantive right rather than merely procedural, and has therefore expressed a strong interest in preserving the right in circumstances where it is most necessary. Thus, the California courts' approach to the waiver of class action rights is generally applicable to contracts without regard to whether they include arbitration agreements.

A. The California Approach To Class Action Waivers Is Similar To The Majority Of Other States.

The vast majority of state courts, and federal courts applying state law, have found certain provisions within arbitration agreements, such as class action waivers, to be unconscionable. ATTM misrepresents the issue when it stated that 25 states and the District of Columbia have all had cases where class action waivers in arbitration agreements were enforced. Pet. Cert. 21-22. Almost half of the states listed have also refused to enforce some provision in arbitration agreements, including class action waivers.[4] For that reason, California may be

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[4] *See e.g. Leonard v. Terminix Intern. Co.*, 854 So. 2d 529 (Ala. 2002) (pesticide contract) (Alabama); *Caban v. J.P. Morgan Chase and Co.*, 606 F.Supp.2d (S.D. Fla. 2009) (credit card contract) (Delaware); *Dale v. Comcast*, 498 F.3d 1216 (11th Cir. 2007) (cable television contract) (Georgia); *Kinkel v. Cingular Wireless*, 857 N.E.2d 250 (Ill. 2006) (cellular telephone contract) (Illinois); *Lozado v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087 (W.D. Mich. 2000) (automobile sales contract) (Michigan); *Whitney v. Alltech Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. Appeals 2005) (cellular phone contract) (Missouri); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio App. 2004) (automobile sales contract) (Ohio); *Herron v. Century BMW*, 387 S.C. 525 (2010) (automobile sales contract) (South Carolina);

added to this list. California has no categorical rule prohibiting class action waivers in contracts; only in cases where the waiver serves as an exculpatory clause is the waiver void due to unconscionability. *See Discover Bank*, 36 Cal.4th 148. *Discover Bank* carefully articulated a precise situation where class action waivers may be used as exculpatory clauses, but in other situations they would likely be enforced.

In addition to the states enumerated in ATTM's petition for *certiorari*, the following states have refused to enforce class action waivers within arbitration agreements in certain circumstances: Arizona, *see Cooper v. QC Financial Services, Inc.*, 503 F.Supp.2d 1266 (D. Ariz. 2007) (payday loan contract); Florida, *see S.D.S. Autos, Inc. v. Chrzanowski*, 976 So.2d 600 (Fla. App. 2007) (automobile lease contract); Massachusetts, *see Skirchak v. Dynamic Research Corp.*, 508 F.3d 49 (1st Cir. 2007) (employment contract); New Jersey, *see Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1 (2006) (payday loan contract); New Mexico, *see Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) (computer sales contract); North Carolina, *see Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93 (2008) (mortgage contract); Oregon, see *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009) (internet equipment sales contract); Pennsylvania, *see Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) (cable

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State ex rel. Dunlap v. Burger, 211 W.Va. 549 (2002) (jewelry sales contract) (West Virginia). Mississippi does not permit class actions in its courts, so it does not apply to arbitration. See *American Bankers Ins. Co. of Florida v. Booth*, 830 So.2d 1205 (Miss. 2002) (Mississippi).

television contract); *Washington, see Scott v. Cingular Wireless*, 160 Wash.2d 843 (2007) (cellular telephone contract); Wisconsin, *see Coady v. Cross Country Bank*, 729 N.W.2d 732 (Wis.App. 2007) (credit card contract).

There is no categorical rule that holds class action waivers to be unconscionable, because unconscionability is by definition an individualized assessment that looks at the particulars of a contract.[5] "Unconscionability cannot be measured in a vacuum. Courts must consider the agreement's effect by examining the bargaining positions of the parties, the bargaining tactics they employed, the claims, and the procedures in place at the putative arbitral forum. Contract principles demand this depth of analysis." Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L.Rev. 255, 315 (1998).

The California courts have followed this mode of analysis with regards to consumer class action waivers. *See Discover Bank*, 36 Cal.4th 148. The general concern behind *Discover Bank* was that parties with vastly superior bargaining power were using class action waivers in contracts of adhesion as exculpatory clauses in violation of California Civil Code §1668.[6] The *Discover Bank* test at issue in this

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[5] The U.C.C. §2-302(2) instructs courts to examine a contract's "commercial setting, purpose, and effect" as part of the unconscionability analysis. The *ad hoc* unconscionability analysis "almost necessarily precludes standardized rules concerning any determination of unconscionability." Richard A. Lord, 8 Williston On Contracts §18:11 (4th ed. 2009).

[6] The concern with arbitration clauses buried in contracts of

case is not a general test for unconscionability, but rather a test to determine if class action or class arbitration waivers in contracts are exculpatory. *Arguelles-Romero*, 184 Cal.App.4th at 838.

The *Discover Bank* test is generally applicable to both arbitration and non-arbitration clauses that include class action waivers. It has admittedly been applied more to arbitration clauses, but this is only due to the fact that thus far other contracts have simply not included such waivers. "In California, private contracts that violate public policy are unenforceable," without regard to whether the agreement concerns arbitration or not. *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77, 94 (2003).

In one of the few California cases that involved a class action waiver in the non-arbitration setting, the court did not hesitate to hold that the waiver was not enforceable under the *Discover Bank* standard. *In re YAHOO! Litigation*, 251 F.R.D. 459 (2008). Similarly, not all waivers of class action in arbitration agreements have been found unconscionable. *See e.g. Arguelles-Romero*, 184 Cal.App.4th at 838.

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adhesion is nothing new to the FAA. One of the few concerns that any legislator expressed over the FAA was Chairman of the Senate Subcommittee on the Judiciary, Senator Sterling's concern over the possibility of arbitration clauses being slipped into adhesive contracts. Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. Of the Comms. On the Judiciary, 68th Cong. (1924).

There is nothing to suggest that the different number of cases that result in a finding of class action waivers as unconscionable in arbitration agreements compared to number of cases with similar results in other contracts are evidence of any bias. The statistics touted for this purpose show little more than the fact that parties have attempted to put unconscionable terms in certain arbitration agreements more often than in other contracts.

There are simply few cases in California involving class action waivers in the non-arbitration setting, and an imbalance in input will naturally lead to an imbalance in output. Furthermore, even within the arbitration agreement arena there are large differences in contract terms between industries. In a study looking at cases before the American Arbitration Association, it was found that 100% of the cases involving cellular telephone contracts contained class arbitration waivers, while 0% of real estate contracts contained such waivers. Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association* 103 (Mar. 2009). These numbers illustrate the manner in which simple comparisons between the outcomes in arbitration agreement cases and other contract cases can be highly misleading.

B. In California, The Right To Be Part Of A Class Action Is A Substantive Right And Not Merely Procedural As The Certified Question Assumes.

The certified question before this Court incorrectly assumes that the class action rights at issue are procedural. In California, the right to bring a class action is a substantive right that is protected by various statutes, including the Consumer Legal Remedies Act. Civ. Code, § 1750 et seq.; *see Armendariz*, 24 Cal.4th 83. The right to a class action, whether in a litigation or arbitration forum, has been held important when there is involved precisely the type of case that class actions were intended to remedy. ("Class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights." *Discover Bank*, 36 Cal.4th at 161). California's emphasis on protecting consumers through the right to participate in a class action echoes the same concerns articulated by Congress and the U.S. Supreme Court on the importance of class actions.[7]

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[7] Congress stated the importance of class actions in the findings of the Class Action Fairness Act: "Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 4 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711-15). Similarly, the Supreme Court has articulated the importance of class actions: "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied

The advantages of class action litigation or arbitration are not easily substituted. As two prominent commentators argued nearly 70 years ago, " [i]f each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law." Kalven and Rosenfeld, *The Contemporary Function of The Class Suit*, 8 U.Chi.L.Rev. 684, 686 (1941).

More recently, Judge Posner stated, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). The Supreme Court also has emphasized the importance of class action with regards to small dollar disputes: "Economic reality dictates that [a] petitioner's suit proceed as a class action or not at all." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974).

California law is in line with this view on the significant import of class action and arbitration. In one of the cases upon which California's *Discover*

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by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980).

Bank rule was based, an agreement unrelated to arbitration contained a provision that was equivalent to a class action waiver. *America Online, Inc. v. Superior Court of Alameda County*, 90 Cal.App. 4th 1 (2001) ("AOL"). *AOL* held that class action rights are significant, and rejected the argument that "the elimination of class actions for consumer remedies...is a matter of insubstantial moment." *Id.* at 18. In addition to the fundamental benefits afforded to the individual, "[a] class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims." *Vasquez v. Superior Court of San Joaquin County*, 4 Cal.3d 800, 808 (1971). The retention of some mechanism for class action is therefore a matter of public interest. Thus, it is not merely procedural as the certified question implies.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

October 6, 2010 Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, and NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When a class-action ban that is otherwise unenforceable under generally applicable contract law is embedded in an arbitration agreement, is the contract law preempted by the FAA?

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Respondents' argument that the Federal Arbitration Act ("FAA") does not preclude courts from striking down particular class action bans as unconscionable under generally applicable principles of state contract law.

Although this case arises in the consumer context, the Court's decision could have far-reaching implications in the labor and employment context, where pre-dispute, mandatory arbitration clauses containing class action bans have become increasingly common. *Amici* represent workers who seek to preserve their right to proceed as a class to challenge violations of the law.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers'

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3

Committee, through its Employment Discrimination Project, has been involved in cases before the Court involving the interplay of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

The Employee Rights Advocacy Institute for Law & Policy ("The Institute") is a non-profit public interest organization which advocates for employee rights by advancing equality and justice in the American workplace. The Institute achieves this mission through a multi-disciplinary approach, combining innovative legal strategies, policy development, grassroots advocacy, and public education. The Institute seeks to eliminate mandatory pre-dispute arbitration of employment claims through public policy and education initiatives, and in 2009 commissioned a "National Study of Public Attitudes on Forced Arbitration."

The National Employment Lawyers Association ("NELA") advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and

regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before the Court and the federal appellate courts regarding the proper interpretation and application of labor and employment statutes to ensure that the goals of those statutes are fully realized. NELA has endorsed the use of class actions as an important tool for vindicating civil rights, whether in a court or through arbitration, so long as arbitration is knowingly and voluntarily agreed to between the parties after disputes arise.

The National Partnership for Women & Families ("The National Partnership") is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the Court and in the federal circuit courts of appeals to advance the opportunities of protected individuals in employment.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the workplace rights of low-wage workers under federal employment and labor laws, with a

special emphasis on wage and hour rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act and related state fair pay laws. This work has given us the opportunity to learn up close about job conditions around the country in garment, agricultural, construction and day labor, janitorial, retail, hospitality, domestic and home health care, poultry and meat-packing, high-tech, delivery, and other services. The low-wage workers in these and other industries face severe barriers to enforcing their rights to fair pay, making collective and class action mechanisms important to uphold the wage floor. A decision of this Court in favor of AT&T will directly undermine NELP's and our constituents' goals of securing fair-pay for all workers.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and exploitation, but also access to effective means of enforcing that right and remedying discrimination and exploitation. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases involving sex discrimination in employment before the Court.

SUMMARY OF ARGUMENT

Class actions play a vital role in vindicating not just the rights of consumers like the Respondents in this case, but also the rights of workers. Class actions protect employees from the threat of retaliation, provide an incentive to employees and to private attorneys to prosecute small claims that would not be brought individually, and increase awareness of workplace violations. Additionally, class actions provide systemic relief, produce systemic change, and deter employers from violating the law. Due to the fundamental importance of class actions for workers whose employment rights have been violated, states play a critical role in policing whether contractual class action waivers run afoul of generally applicable contract law principles.

The FAA does not preclude courts from striking down particular class action bans as unconscionable because the FAA does not preempt generally applicable state law principles of contract interpretation. Along with other states, California evaluates class action waivers – whether they appear in arbitration agreements or any other agreement – on a case-by-case basis. These states, applying general principles of contract law, have held that a class action waiver may be unconscionable under certain narrow circumstances, including where class litigation is essential to the vindication of important statutory rights.

ARGUMENT

This case presents the important question of whether states retain authority to apply general principles of contract interpretation to class action waivers found in arbitration agreements. In *amici*'s experience, the use of such waivers is becoming increasingly common in the labor and employment context,[2] particularly in so-called "take it or leave it" contracts that employees are required to sign in exchange for employment.

As California and many other states have concluded, in certain, limited circumstances, class action waivers can work to exculpate defendants from liability, rendering such waivers unconscionable under states' generally applicable rules of contract law. In the labor and employment context, waivers can represent a serious impediment to the vindication of workplace rights in two important ways. First, they create a practical barrier to the enforcement of rights. Most employees do not pursue claims individually for various reasons. The employees may fear retaliation, they may not be able to find counsel willing to pursue relatively small claims on an individual basis, or they simply may not know that they have been the victims of illegal conduct. Second, because so few employees are willing or able to pursue their claims individually, class action waivers threaten our

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[2] *See* Samuel Estreicher & Steven C. Bennett, "*Using Express No-Class Action Provisions to Halt Class-Claims,*" N.Y.L.J., June 10, 2005 ("[M]any employers have begun incorporating explicit 'no-class action' clauses into their employment alternative dispute resolution (ADR) programs").

nation's ability to protect important rights in the workplace, including the right to equal employment opportunity and payment of the minimum wage and overtime.

I. Class Actions Are Critical to Enabling Employees to Vindicate their Statutorily Protected Rights Because Employees Face Real Obstacles to Bringing Individual Claims.

Throughout the United States, workers are routinely denied their most basic rights in the workplace. *See* Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 9 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited Oct. 4, 2010). Violations of federal and state wage and hour laws are especially rampant. A national survey of low wage workers in the three largest U.S. cities recently found that twenty-six percent of workers were paid less than the minimum wage and more than seventy-five percent were owed overtime pay that they were not paid in the previous week. *Id.* at 21-22, 33. These workers lost – and their employers illegally gained – an average of $56.4 million dollars per week. *Id.* at 50. When employers violate the law, the communities in which their employees live also suffer because employees have less money to inject into the local economy.[3] Governments also

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[3] *See* Nat'l Emp't Law Project, *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor* 5, 7 (2010), *available at* http://www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1 (last visited Oct. 4, 2010);

lose out on billions of dollars in payroll and tax revenues.[4]

While these violations impact all segments of society, they overwhelmingly affect low-wage workers who cannot safeguard their fundamental wage and hour, civil rights, and other statutory rights in the workplace without the availability of class actions.

Class litigation, with its potential for meaningful monetary and injunctive relief and its resolution through public, non-confidential settlement agreements or judgments, provides a powerful incentive to employers to choose compliance as the most cost-effective strategy.

Bernhardt, *supra*, at 5.

[4] *See, e.g.*, Fiscal Policy Inst., *New York State Workers Compensation: How Big is the Shortfall?* 8-15 (2007), *available at* http://www.faircontracting.org/PDFs/prevailing wage /FPI_WorkersCompShortfall_WithAddendum.pdf (last visited Oct. 4, 2010); Peter S. Fisher et al., Iowa Policy Project, *Nonstandard Jobs, Substandard Benefits*, 13-14 (2005), *available at* http://www.cfcw.org/Nonstandard.pdf (last visited Oct. 4, 2010); François Carré & Randall Wilson, Construction Policy Research Ctr., *The Social and Economic Costs of Employee Misclassification in Construction* 14-16 (2004), *available at* http://www.law.harvard.edu/programs/lwp/Misclassification%20Report%20Mass.pdf (last visited Oct. 4, 2010).

A. Class Actions Remove Important Practical Barriers to Justice that Employees Face.

1. Class actions protect employees from the threat of retaliation.

Across job markets and especially in difficult economic times, the threat of reprisal is a significant impediment that prevents employees from pursuing claims against their employers.[5] Current employees who challenge the legality of their employers' policies face the real prospect of being fired from their jobs.[6] Even when they are not fired, workers

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[5] *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*: 29 Berkeley J. Emp. & Lab. L. 269, 296-97 (2008) ("Workers do not pursue rights claims in a vacuum; there are risks to participating in rights enforcement because one must decide whether to challenge employer practices from within the employment relationship."); Steven G. Zieff, *Advanced Issues in Collective Actions*, 10 Emp. Rts. & Emp. Pol'y J. 435, 437 (2006); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 83 (2005) (referring to studies suggesting that "despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights").

[6] *See, e.g., Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290 (1960) (plaintiffs were fired after they filed FLSA claims based on employer's "displeasure" over their actions); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 874 (2d Cir. 1988) (employees were discharged after refusing to take a "loyalty oath" repudiating their rights to unpaid wages); Bernhardt, *supra*, at 3 (forty-three percent of the low wage workers who complained about violations of workplace standards were retaliated against, including by being fired,

face other forms of retaliation, including harassment, less desirable work assignments, and reductions in their hours or pay.[7] Former employees also face enormous challenges finding new employment as a result of industry blacklisting and the refusal of their former employers to provide them with positive job references. *See, e.g., Mori-Noriega v. Antonio's Rest., Inc.*, 923 F.2d 839 (1st Cir. 1990) (unpublished table decision) (plaintiff's current employer fired him because he had cooperated with the Department of Labor in its investigation of his former employer's violation of wage and hour laws). As the Court recognized over thirty years ago, employers, "by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job

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suspended, or threatened with cuts in their hours or pay); Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 37 (2005) (discussing the high risk of retaliation and the social costs imposed on people who complain about discrimination and how they sharply discourage women from reporting it to authorities or legal institutions); Steven Greenhouse, *Forced to Work Off the Clock, Some Fight Back*, N.Y. TIMES, Nov. 19, 2004, at A1 (quoting a former manager stating that workers who complained of wage and hour violations were "weeded out and terminated").

[7] *See, e.g., Greensboro Prof'l Fire Fighters Ass'n, Local 3157, IAFF v. City of Greensboro*, C-89-245-G, No. 89-245-G, 1991 WL 716736, at *1 (M.D.N.C. Aug. 29, 1991) (plaintiff was not promoted to the position of fire captain in retaliation for having asserted his rights under the FLSA by opting in), *aff'd sub nom. Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995); Bernhardt, *supra*, at 24; Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 Employee Rts. & Emp. Pol'y J. 395, 410-11, 423 (2006).

assignments can be switched, hours can be adjusted, wage and salary increases can be held up, and other more subtle forms of influence exerted." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978).

Although employees across all industries and income brackets risk retaliation for pursuing claims against their employers, these risks are heightened for low-wage workers, many of whom are immigrants with limited English proficiency and/or with little or no familiarity with their legal rights. These workers are particularly vulnerable to retaliation because of their dependence on each paycheck to make ends meet and their tendency to work in low-skilled jobs where employers consider them easily replaceable and therefore expendable.

Class actions protect employees against retaliation and the fear of retaliation because they allow all but a few class members to pursue their rights without having to step forward and publicly challenge their employer. For this reason, courts have widely recognized the essential role of class actions in the vindication of workers' rights.[8]

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[8] *See, e.g., Deposit Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (it is "reasonably presumed" that potential class members still employed by their employer "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs"); *Smellie v. Mount Sinai Hosp.*, No. 03-0805, 2004 WL 2725124, at *4 (S.D.N.Y. Nov. 29, 2004) (authorizing class action because "class members who still work for [defendant] may be reluctant to serve as named plaintiffs in an action against their employer for fear of reprisals"); *Horn v. Associated Wholesale Grocers*, 555 F.2d 270, 275 (10th Cir. 1977) (holding that district court erred in failing to take judicial notice of the fact that employees are apprehensive

2. Class actions provide an incentive to employees and to attorneys to prosecute small claims.

This Court has held repeatedly that a class action may represent the only means of judicial relief where a plaintiff's claim is too small economically to support individual litigation.[9] Employment claims, especially wage and hour claims, typically involve very small per person damages.[10] Although the

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about the loss of their jobs, the welfare of their families, and of offending their employer as a result of taking a stand); *Simmons v. City of Kansas City, Kan.*, 129 F.R.D. 178, 180 (D. Kan. 1989) (certifying class of forty-nine current and former African-American police officers alleging discriminatory promotion policy where class certification minimized the likelihood of retaliation against individual members).

[9] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that the policy at the very core of the class action mechanism "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights") (internal quotation marks omitted); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually"); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.")

[10] *See Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 563 (D. Or. 2009) (recognizing the superiority of class actions due to the typically small size of individual awards); *Chase v. AIMCO Properties, L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) ("individual wage and hour claims might be too small in dollar terms to support a litigation effort"); *Sav On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 209 (Cal. 2004) (observing, in an overtime action,

rights at issue in these cases are crucial, most workers simply cannot afford the time and expense it would take to prosecute their claims individually. Moreover, for most plaintiffs' attorneys, employment claims are prohibitively expensive to litigate on an individual basis. *See Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85-86 (S.D.N.Y. 2001) (noting that individual suits, as an alternative to class litigation, may not be feasible based on class members' lack of financial resources and disincentives for attorneys); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (concluding that a class action is the superior method for bringing plaintiffs' overtime claims, in part, because "the cost of individual litigation is prohibitive").

Individual litigation requires one plaintiff to shoulder all of the demands of the lawsuit herself, including spending countless hours assisting in the investigation of the claims and bearing the financial and emotional costs of the litigation alone. For low-wage workers, most of whom work long hours and have little or no flexibility to change their schedules, individual litigation is simply out of the question.[11]

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that "the class suit...provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation") (internal quotation marks omitted). *See also* Catherine K. Ruckelshaus, *Labor's Wage War*, 35 Fordham Urb. L.J. 373, 386 (2008) (discussing factors, including the typically small size of each individual worker's claim, that contribute to workers' lack of access to the courts).

[11] *See Braun v. Wal Mart Stores, Inc.*, No. 19-CO-01-9790, 2003 WL 22990114, at *12 (D.C. Minn. Nov. 3, 2003) ("[M]embers of the class have little practical ability to prosecute their claims in separate actions, in light of the substantial cost associated with

The class mechanism, on the other hand, limits the extent to which any one class member bears the burden of prosecuting the litigation. In wage and hour class actions, for example, courts routinely grant back wages to class members on the basis of representative evidence of the employer's unlawful conduct.[12] Such proof significantly relieves the pressure on any one class member.

Even if an employee is able to make the time for individual litigation, most employment claims

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gathering and presenting the evidence . . . . If the class is not certified, individual claimants effectively would be denied any remedy because the expense of prosecuting individual claims likely would vastly exceed the amount in controversy for each claim); *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Cal. Ct. App. 2004) (noting that the costs of litigation may involve travel expenses and time off from work to pursue the case, and the value of any ultimate recovery may be further reduced by legal expenses). *See also* Ruckelshaus, *supra* note 10, at 387 (noting the impracticability for the vast majority of workers to support an individual action).

[12] *See, e.g.*, *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) ("the plaintiffs correctly point out that not all employees need testify in order to prove FLSA violations or recoup back-wages"); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) (twenty-two out of seventy employees testified); *Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir. 1992) (back pay to be awarded "to the nontestifying employees based on the fairly representative testimony of the testifying employees"); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (five out of twenty-eight employees testified); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983) (testimony of twelve former employees supported award to all former employees); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982) (twenty-three employees testified to support award to 267 employees).

are prohibitively expensive for plaintiffs' attorneys to prosecute on an individual basis. *See Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002); *Ansoumana*, 201 F.R.D. at 86; Juliet M. Brodie, *Post Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 Wash. U.J.L. & Pol'y 201, 248-49 (2006) (addressing the "reality that the wage and hour cases of the working poor . . . tend to involve relatively small dollar figures, prohibitively small for a private attorney"). Such claims make far more economic sense to prosecute in the aggregate particularly when they involve a single policy applied to hundreds, if not hundreds of thousands, of workers, resulting in cumulative damages that are significant.[13] When the claims are prosecuted collectively, it becomes economically feasible for attorneys to offer representation on a contingency basis – a necessity for all but the most highly paid workers.[14]

Government agencies charged with enforcing

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[13] *See Amchem Prods.*, 521 U.S. at 617 (recognizing "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" and that "class action[s] solve[] this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor") (internal quotation marks omitted). *See also* William B. Rubenstein, Alba Conte, & Herbert B. Newberg, *Newberg on Class Actions* § 24:64 (4th ed. 2010) (noting that class actions tend to produce much larger fee awards for attorneys, in part, because of the potential for creating a substantial common fund and seeking a generous fee from the fund for producing a significant result for the class).

[14] *See, e.g., Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (explaining that an attorney would not take a case on contingency with a low potential payout).

the nation's employment laws cannot substitute for private attorneys because these agencies lack the resources to prosecute large numbers of individual cases.[15] For example, the Equal Employment Opportunity Commission received 93,277 charges of discrimination in 2009, but filed only 314 enforcement suits.[16] In 2008 and 2009, the Government Accountability Office, the investigative arm of Congress, found that the U.S. Department of Labor's Wage and Hour Division had delayed investigating hundreds of minimum wage and overtime complaints and had reduced the number of enforcement actions by thirty-seven percent over the previous ten years.[17]

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[15] Nat'l Emp't Law Project, *supra* note 3, at 15.

[16] Equal Employment Opportunity Commission Charge Statistics FY 1997 Through FY 2009, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Oct. 4, 2010); Equal Employment Opportunity Commission, EEOC Litigation Statistics, FY 1997 Through FY 2009, http://www.eeoc.gov/eeoc/ statistics/enforcement/litigation.cfm (last visited Oct. 4, 2010).

[17] U.S. Gov't Accountability Office, GAO-08-962T, Fair Labor Standards Act: Better Use of Resources Could Improve Compliance 5-6 (2008) (finding that the Wage and Hour Division reduced the number of enforcement actions it pursued annually by more than a third, from 47,000 in 1997 to under 30,000 in 2007, in part, because of a 20 percent decrease in the number of investigators), *available at* http://www.gao.gov/new.items/d08962t.pdf (last visited Oct. 4, 20, 2010). U.S. Gov't Accountability Office, GAO-09-629, Department of Labor: Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft (2009), *available at* http://www.gao.gov/new.items/d09629.pdf (last visited Oct. 4, 2010).

3. Class action notification procedures increase awareness of workplace violations.

Individual employees are often unaware that their rights have been violated. Many workers, especially low wage and immigrant workers, are unfamiliar with the laws that protect them.[18] Some are misinformed by their employers who claim that the law does not protect them or that they are exempt from the law's overtime and minimum wage protections.[19] Where the violations are hidden, for example, in cases alleging discriminatory pay disparities that rely on statistical proof, even the most sophisticated workers may have no means of determining that they have been the victims of illegal conduct.[20] *See Lilly Ledbetter Fair Pay Act of*

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[18] *Gentry v. Superior Court*, 165 P.3d 556, 565-67 (Cal. 2007) ("[S]ome individual employees may not sue because they are unaware that their legal rights have been violated"); *cf. Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006) ("[W]ithout the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged").

[19] *Misra v. Decision One Mortg. Co., LLC*, 673 F. Supp. 2d 987, 991 (C.D. Cal. 2008) (defendants misrepresented to employees that they were exempt and not entitled to overtime pay); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984) (plaintiffs alleged affirmative misrepresentations by employer which were sufficient to toll the statute of limitations applicable to their claims); *Gentry*, 165 P.3d at 461 ("The likelihood of employee unawareness is even greater when, as alleged in the present case, the employer does not simply fail to pay overtime but affirmatively tells its employees that they are not eligible for overtime.")

[20] *See* Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law,*

2009, 155 Cong. Rec. S229 (daily ed. Jan. 8, 2009) (statement of Sen. Leahy) (noting that the Act was intended to address "a reality of the workplace – pay discrimination is often intentionally concealed by employers").

Class actions increase awareness of workplace abuses through their notification procedures. Class notice is often the only means by which workers learn of challenges to practices that they suspected were illegal, but lacked the proof to challenge individually.[21] Notice not only informs class members of their rights, it also provides them with an entry point into the legal system by directing them to class counsel and to an existing lawsuit. This aspect of notice, in particular, can be extremely valuable to employees, especially low-wage earners, because it lets them know they are not alone in challenging a policy or practice in their workplace.[22]

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25 Berkeley J. Emp. & Labor L. 167, 168, 171, 178 (2004) (explaining that one third of U.S. private sector employers have policies which bar employees from discussing their salaries and that those employees who perceive wage differentials observe them "without the full information necessary to evaluate the justifications for differing wages")

[21] *See Newberg on Class Actions* § 8:4 (notice under "[Federal Civil Procedure] Rule 23(c)(2) is designed to alert the parties to the pendency of a Rule 23(b)(3) class action, for the purpose of allowing the parties to make conscious choices that affect their rights in a litigation context")

[22] *See* Weil & Pyles, *supra* note 5, at 91 (discussing studies showing that workers are more likely to exercise rights where they have an agent that assists them in use of those rights).

B. Class Actions Benefit Employees Overall by Producing Systematic Changes that Individual Cases Cannot Attain.

1. Class actions produce a deterrent effect that individual cases cannot achieve.

Class actions provide an essential counterweight to employers' economic incentive to violate the law in two important ways. First, the scope of class litigation – including the number of workers covered – increases the likelihood that a non-compliant employer will be brought fully into compliance. Second, the capacity of class litigation to obtain significant damages, including attorneys' fees, makes the potential cost of non-compliance greater than the cost of compliance. Because individual litigation typically only provides a remedy to the plaintiff (and not systemic or monetary relief for those similarly situated) and cannot match the aggregate damages of class actions, it simply does not have the deterrent effect of class litigation.

Government enforcement also cannot match the deterrent capacity of class litigation because government agencies rarely seek the full extent of damages afforded by the law and largely seek individual monetary remedies instead of seeking industry-wide or injunctive relief.[23] For example, investigators at the U.S. Department of Labor's Wage and Hour Division are instructed not to

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[23] *See* Nat'l Emp't Law Project, *supra* note 3, at 9-10.

include the 100% liquidated damages permitted by the law in their negotiations with employers and to seek backpay for just two years of the potential three year statute of limitations period.[24] Under these circumstances, employers can reasonably assume that, if they are caught, the only cost they will incur for breaking the law is to pay the wages they would have owed from the outset. In addition, because most government investigations are claims-driven, investigators are not required to expand their investigations to include a claimant's similarly situated co workers or seek relief for them even when it is obvious that the employer applied the same unlawful policy to many workers.[25] As a result, governmental enforcement efforts can be narrow, limited, and piecemeal.

2. Class actions enable employees to obtain injunctive relief that is not available to individual litigants.

The Supreme Court has long recognized that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs." *E. Tex. Motor Freight Motor Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). To correct such wrongs, employees must be able to demand broad, systemic changes to their employer's policies and practices in the form of injunctive relief. *See, e.g., Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983) ("Title VII and the class action

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[24] *Id* at 10.

[25] *See id.*

rule should be construed so as to further the strong public policy of eradicating all vestiges of [...] discrimination in employment.") Injunctive relief obtained from class actions has produced tremendous change in the American workplace.[26]

The drafters of Rule 23 of the Federal Rules of Civil Procedure had precisely this goal in mind when they proposed Section (b)(2) in 1966. That Section authorizes class certification where an employer "has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) was born out of a recognition that individual lawsuits cannot readily achieve the sort of sweeping results that are necessary to combat discrimination. *See* Fed. R. Civ. P. 23 Advisory Committee's Notes, 1966 Amends., Subdiv. (b)(2) ("actions in the civil-rights field where a party is charged with discriminating unlawfully against a

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[26] *See, e.g., Freeman v. City of Philadelphia*, 751 F. Supp. 509 (E.D. Pa. 1990) (increasing the number of African-American police officers in Philadelphia's police force from 12% to 35%); Public Interest Law Center of Philadelphia, *Law Center Joins Forces with Other Civil Rights Organizations to Protect Ability to Combat Discrimination With Class Action Lawsuits* (Oct. 31, 2007), http://www.pilcop.org/ed.html (last visited Oct. 4, 2010) (noting the increase in the number of African-Americans in Philadelphia's police force as a result of the consent decree); *Butler v. Home Depot*, C 94-4335, 1997 WL 605764 (N.D. Cal. 1997) (more than doubling the representation of women in management-track positions at Home Depot, one of the nation's largest retail chains); *Home Depot, Female Employees Report Progress* (June 24, 2002), http://hr.blr.com/HR-news/Discrimination/Sex-Discrimination/Home-Depot-Female-Employees-Report-Progress/ (reporting the increase in the number of women in management-track jobs at Home Depot) (last visited Oct. 4, 2010).

class" are a type of action appropriately maintained under Rule 23); *Amchem Prods.*, 521 U.S. at 614; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 389 (1967). Building on experience in civil rights litigation, the drafters acknowledged that individual lawsuits had been "inadequate" to meet the challenges posed by institutional discrimination and, in any case, were an "inefficient" means to do so. Kaplan, *supra*, at 389 (noting that Rule 23(b)(2) was "built[] on experience mainly, but not exclusively, in the civil rights field").

Injunctive relief is not readily available to individual litigants because it is often impossible for them to muster the evidence to prove a widespread pattern of discrimination.[27] Even when the evidence reflects a discriminatory policy that affected other workers, some courts have held that broad injunctive relief is prohibited when it is deemed to exceed what is necessary to give individual relief to the plaintiff.[28]

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[27] *See infra* Part I.B.3.

[28] *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (noting the general "rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" and declining to apply it to the class action before it); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefiting an entire class in an *individual suit*, such broad relief is rarely justified . . . ."); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766-67 (4th Cir. 1998), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999), *reaff'd, Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 437 (4th Cir. 2000), *cert. denied*, 531 U.S. 822 (2000); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992), *cert.*

Thus, for example, if the named plaintiff has left her job with the employer and does not intend to return, no injunctive relief will be available. In the absence of class actions, these limitations on the availability of injunctive relief in individual suits will have a profound effect on the capacity of civil rights laws to eradicate discrimination.

3. Class actions expose institutional violations that may stay hidden in individual cases.

Employment discrimination cases often involve challenges to widespread policies, patterns, or practices that produce discriminatory effects when applied to hundreds or thousands of workers. From the perspective of an individual employee, however, it can be impossible to identify, let alone prove, a pattern of systemic discrimination. To do so, employees require proof on a scale that will permit an allegedly unlawful pattern, if one exists, to emerge. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 40 n.20 (1977) ("Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation . . . . In many cases the only available avenue of proof is the use of . . . statistics to uncover clandestine and covert discrimination by the employer or union involved.")

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denied, 508 U.S. 930 (1993); *Ameron, Inc., v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986), *approved on reh'g*, 809 F.2d 979, 982 n.1 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curium)

In class actions, plaintiffs typically rely on statistical analyses of companywide data to establish a discriminatory pattern or practice. *Id.*; *Hazelwood Sch. Dist. v. United States*, 431 U.S. 299, 307-308 (1977) (noting that "statistics can be an important source of proof in employment discrimination cases"); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001) ("[S]tatistical proof almost always occupies center stage in a prima facie showing of a disparate impact claim.") Once a pattern is established, it creates a rebuttable presumption that each class member was a victim of the discrimination and shifts the burden to the defendants to show otherwise. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984); *Teamsters*, 431 U.S. at 361-62. The quantum of evidence available to class action plaintiffs is often unavailable to individual litigants, however, because such litigants may not be afforded the broad discovery rights permitted in class action cases. *See Newberg on Class Actions* § 5:12 ("Whether a class action is brought for injunctive relief, damages, or both, the use of the class device, in contrast to the individual action, provides the plaintiff with a broader base for pretrial discovery and presents the court with a more complete record on which to reach its liability determinations."), § 24:62 ("The broader discovery rights of the class action device are useful in the employment context when seeking to establish wide-scale discriminatory practices by providing a more complete record on which to reach determinations on either injunctive relief or liability.") Because of these limits, employees who are required to litigate their claims individually will be at a severe disadvantage and very likely unable to

muster the evidence required to establish a pattern of discrimination or benefit from the presumption that flows from it.

II. Applying General Contract Law Principles, States Have Adopted Standards that Balance Freedom of Contract with Protection of Important Statutory Rights in the Workplace.

Petitioner falsely suggests that California has adopted a "near-categorical ban on arbitration agreements that do not allow for class-wide dispute resolution." Pet. Br. 15. On the contrary, California's prohibition of class action waivers in contracts is limited to a narrow set of circumstances and does not disfavor arbitration agreements in particular. California's class action waiver analysis, like that of many other states, is nuanced. The analysis turns on the practical implications of the waiver in question, as understood in the context and circumstances of the particular case. Accordingly, in California and in other states, class action waivers have been upheld in some cases and invalidated in others, under generally applicable principles of state contract law.

A. The Interpretation of an Arbitration Agreement Is Generally a Matter of State Law; the FAA Does Not Preempt a State's Interpretation of Generally Applicable Contract Law.

As the Supreme Court recently noted in *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.*, "the interpretation of an arbitration

agreement is generally a matter of state law." 130 S. Ct. 1758, 1773 (2010). The Court went on to state that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* (quoting *Volt Info. Sciences, Inc.* v. *Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

The FAA does not preempt generally applicable principles of state contract law. The FAA provides that a contractual arbitration provision "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*," 9 U.S.C. § 2 (emphasis added). Section 2 of the FAA has been interpreted to mean that generally applicable state contract law defenses like unconscionability, fraud, forgery, duress, mistake, or lack of consideration or mutual obligation can invalidate arbitration agreements. *Cooper v. MRM Investment Co.*, 367 F.3d 493, 498 (6th Cir. 2004). Thus, state contract law principles can invalidate an unconscionable arbitration provision "without contravening § 2 of the FAA." *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 988 (9th Cir. 2007) (internal quotation marks omitted).

B. California Law Reflects a Straightforward Application of General Principles of Contract Interpretation.

Under California law, courts "may refuse to enforce" any contract found "to have been unconscionable at the time it was made," or sever or

"limit the application of any unconscionable clause" in order to "avoid any unconscionable result." Cal. Civ. Code § 1670.5(a). In *Discover Bank v. Superior Court*, the California Supreme Court adopted a nuanced rule to evaluate, on a case-by-case basis, whether a particular class action ban is unconscionable. 113 P.3d 1100, 1110 (Cal. 2005). Under *Discover Bank*, a class action ban is unconscionable if it is found in a contract of adhesion, if the disputes for which it bans class treatment generally involve small amounts of damages, and if the party with the superior bargaining power allegedly has carried out a scheme to deliberately cheat large numbers of individuals out of individually small sums of money. *Id.*

Contrary to Petitioner's assertion, *Discover Bank* did not establish a blanket ban on class action waivers in arbitration agreements. For example, a California appellate court recently upheld a class action ban after determining that state law on unconscionability "as it applie[d] to the specific circumstances of [the] case," did not render the particular ban unenforceable. *Arguelles Romero v. Super. Ct.*, 109 Cal. Rptr. 3d 289, 304 (Cal. Ct. App. 2010).

As noted in *Discover Bank*, courts should consider the intent underlying the adoption of the class waiver in question. Numerous corporate representatives have urged their clients to adopt and enforce class action bans precisely because putative class members may never bring individual claims, thereby dramatically reducing their clients'

exposure.[29] Provisions that are intended to operate as exculpatory clauses are rendered unconscionable and unenforceable under general principles of state contract law.

In cases challenging class action bans in employment agreements, the California Supreme Court refined the nuanced rule established in *Discover Bank*. In *Gentry v. Superior Court*, the California Supreme Court set out factors to be considered in determining whether a class action waiver in an employment agreement is enforceable. 165 P.3d 556, 568 (2007). The case involved claims that Circuit City Stores illegally failed to pay overtime to hundreds of employees. Following *Discover Bank*, *Gentry* emphasized the case-by-case inquiry that courts must undertake when evaluating the enforceability of class action waivers. *Id.* The court expressly declined to hold that all provisions that prohibit employees from bringing overtime

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[29] *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 396 & n.121-123, 419 (2005) ("Aggressive employers such as Circuit City have already used collective action waivers to avoid classwide exposure in the employment context."); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 13-17 & n.2 (2000) (potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. Rev. 49, 59-60 & n.47 (2004) (barring class actions can operate as an exculpatory clause; no doubt such is the intent of the drafters of class action bans).

cases on a class basis are unenforceable. *Id.* at 567-68.

Gentry applied a multi-factor test that was narrowly tailored to the special circumstances of the case and intended to assess the extent to which the availability of class treatment was essential to the vindication of the rights at issue. The factors included: whether class arbitration would be more effective than individual arbitration in vindicating the employee rights at issue, whether individual recovery amounts sufficiently incentivized individuals to file suit, the risk of retaliation to employees, and the likelihood that employees would be unaware of the alleged illegal conduct absent a class action. *Id.* at 568.

Applying these factors, the court concluded that they all weighed against enforcement of Circuit City's class action ban. The court noted the important function that "class actions play . . . in enforcing overtime laws," because they are more efficient and less expensive than individual cases and thus increased the odds that overtime suits would be brought, they protect employees against the risk of retaliation by allowing a few employees to stand up for many, and serve to inform employees who are unaware of their legal rights that their rights may have been violated. *Id.* at 564-68.

California courts have applied *Gentry* in employment cases involving similar factual circumstances. For example, a state appellate court recently held that a class action waiver was unenforceable where a group of truck drivers had

alleged that their employer had denied them meal and rest breaks and overtime under state labor laws. *Franco v. Athens Disposal Co., Inc.*, 90 Cal. Rptr. 3d 539 (Cal. Ct. App. 2009), *reh'g denied* (Apr. 1, 2009), *as modified* (Mar. 18, 2009), *review denied* (June 17, 2009), *cert. denied*, 130 S. Ct. 1050 (2010). The court found that enforcement of the class waiver effectively would have prevented the plaintiffs from obtaining qualified counsel because the potential damages were modest, would have increased the potential for retaliation against employees that chose to proceed individually, and would have prevented many similarly situated employees from knowing that their rights had also been violated. *Id.* at 542, 551-55.

Similarly, a California appellate court refused to enforce an employment arbitration agreement that required individual rather than class arbitration in *Sanchez v. Western Pizza Enters., Inc.*, 90 Cal. Rptr. 3d 818 (Cal. Ct. App. 2009). The case involved allegations that a restaurant paid its delivery drivers 80 cents per delivery in violation of minimum wage laws. *Id.* at 824. The court declined to enforce the class action waiver provision for a number of reasons, including the fact that the amounts at issue were small, the plaintiffs were low wage earners, the potential for retaliation was significant, and the plaintiffs were mostly immigrants with limited English skills, likely to be unaware of their legal rights. *Id.* at 832.

C. Other States Also Have Adopted Nuanced Approaches to Evaluating the Enforceability of Class Action Waivers.

In addition to California, many other states have applied their generally applicable contract law principles to invalidate class action waivers in certain employment agreements and in other narrow contexts. *See* Respondents' Br. 17-24. For example, in an overtime case filed under the FLSA, the First Circuit held that a class action waiver found in an employment agreement was unconscionable under Massachusetts contract law. *Skirchak v. Dynamics Research Corp*, 508 F.3d 49, 58-59 (1st Cir. 2007).

Similarly, in *Walker v. Ryan's Family Steak Houses, Inc.*, a case alleging minimum wage and overtime violations under the Fair Labor Standards Act, the Sixth Circuit affirmed the district court's decision that a class action waiver was unenforceable. 400 F.3d 370 (6th Cir. 2005). The trial court considered that many of the employees had limited education and were in serious financial need. 289 F. Supp. 2d 916, 933 (M.D. Tenn. 2003). The court also noted:

> The unavailability of class arbitration . . . burdens employees and benefits employers. Employees must shoulder the fees of individual arbitration themselves and must summon the wherewithal to pursue individual claims that might be common to other employees; this disincentive might result in fewer claims, to the benefit of

> employers. Moreover, in the Fair Labor Standards Act area particularly, often each individual claim results in a small monetary remedy, whereas class actions often result in practice and programmatic change that benefit all employees.

Id. at 926. *See also Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1262 (9th Cir. 2005) (holding that "Circuit City's arbitration agreement requires employees to forgo essential substantive and procedural rights and that the clauses regarding . . . class actions [among others], render the arbitration agreement excessively one-sided and unconscionable").

The arbitral forum must provide litigants with an effective substitute for the courtroom. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (the "prospective litigant" must be able to "effectively . . . vindicate [his or her] statutory cause of action in the arbitral forum") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). Particularly in the context of employment disputes, class treatment can be essential to the effective vindication of certain types of claims. Generally applicable principles of state contract law protect workers from unconscionable provisions that are intended as exculpatory clauses that deter individuals from vindicating their rights. The FAA does not preempt states from evaluating the enforceability of class action waivers under these principles of state contract law.

CONCLUSION

For the above reasons, the *amici* respectfully request that the judgment of the Ninth Circuit be AFFIRMED.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AND NATIONAL CONSUMER ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae, who are described in an Appendix to this brief, are national public-interest organizations, coalitions of consumer groups and advocates, and legal-services providers. Amici advocate for the interests of consumers or provide legal services to consumers harmed by wrongful business practices. They submit this brief in support of respondents.

Petitioner AT&T Mobility LLC ("AT&T") and its amici maintain that because AT&T's ban on classwide proceedings is embedded in a mandatory arbitration clause, the Federal Arbitration Act ("FAA") preempts the application of state contract law holding the ban unenforceable as unconscionable and exculpatory. Amici are gravely concerned that if the Court accepts that position, businesses could effectively strip consumers of their right to pursue small claims in *any* forum because, for modest claims, classwide proceedings often offer the only effective means for consumers to obtain redress and to force businesses to halt illegal practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like the court of appeals below, state and federal courts across the country, applying the laws of twenty states, have ruled that prohibitions on classwide

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel made a monetary contribution to this brief's preparation and submission. The parties have filed blanket consents to amicus briefs.

proceedings (whether in court or in arbitration) may be unenforceable in particular cases under general contract-law principles. Respondents' Br. Appx. By its express terms, the FAA does not preempt the application of state contract-law principles to such class-action bans. *See* 9 U.S.C. § 2 (arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). This Court should reject petitioner's effort to turn a question of state-law unconscionability into one of federal law just because an arbitration provision is involved.

There is nothing surprising about the application of state contract law forbidding unconscionable terms and exculpatory clauses to class-action bans embedded in arbitration agreements. Prohibitions on aggregate litigation are properly held unconscionable or unfairly exculpatory where they make important contractual and statutory rights unenforceable—a circumstance that may arise when businesses have engaged in wrongful conduct that inflicts modest damages on individual consumers unlikely to have the knowledge, incentive, or effective means to obtain redress.

To begin with, the losses suffered by individual customers as a result of business misconduct often are small, even though the harm may be enormous in the aggregate. *See, e.g.*, Federal Trade Commission ("FTC") Staff Report, *Consumer Fraud in the United States: An FTC Survey* ES-2, 28, 39 (2004) (estimating that in one year, nearly 25 million adults were victims of certain kinds of consumer fraud; among those who lost money, median loss was $220), *available at* http://www.ftc.gov/

reports/consumerfraud/040805confraudrpt.pdf. When the loss is small, "it is less likely to be recognized by those affected." Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 68 (Rand Inst. for Civil Justice 2000) ("Rand Study"). Even if they realize they have been cheated, aggrieved consumers may not know they have legally enforceable rights, making it unlikely that they will seek relief from unlawful business practices.

When individual damages are low, moreover, it is often not economically feasible to hire a lawyer to take such a "negative value" suit without the ability to spread costs. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (class-action mechanism overcomes problem of small recoveries "by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor") (citation omitted); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[T]his lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."); *see also* Fed. R. Civ. P. 23, 1966 advisory comm. note (observing that "[t]he interest of individuals in conducting separate lawsuits . . . may be theoretic rather than practical" because "the amounts at stake for individuals may be so small that separate suits would be impracticable"). As the Federal Judicial Center ("FJC") has observed: "Without an aggregative procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied." Thomas E. Willging et al., *Empirical Study of Class Actions in*

Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 7 (Fed. Judicial Ctr. 1996).

Although the lack of counsel available to take small-value claims affects all consumers, persons living in poverty are particularly disadvantaged. Whereas an estimated two thirds of middle-class civil legal needs are not met, that estimate climbs to four fifths for low-income persons. *See* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 377, 397 (2004); *see also* Legal Services Corporation, *Documenting the Justice Gap in America* 4 (2d ed. 2007) ("[o]nly a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance" of a lawyer). As one district court emphasized in certifying a class action against a payday lender: "This is precisely the kind of case that class actions were designed for, with small or statutory damages brought by impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant." *Van Jackson v. Check 'N Go of Ill., Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000). Without a class action, that defendant "might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy." *Id.*

Aggregate litigation levels the playing field in disputes between businesses (which automatically aggregate the costs and benefits of a practice affecting consumers) and individual consumers (who can do so only by joining a class). Class actions enable plaintiffs

"to exploit the 'economies of scale' the defendant already naturally enjoys from treating separate claims as a single litigation unit." Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1382 (2000). Because class counsel "can spread their investment over all of the claims—just as the defendant does—it becomes possible to make investments in the litigation that the plaintiffs could not make if the claims were prosecuted separately." *Id.* at 1380. As the California Supreme Court has recognized, the availability of classwide action is, "particularly in the consumer context, often inextricably linked to the vindication of substantive rights." *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1109 (Cal. 2005).

Individual arbitration is no substitute for class actions for the same reason that individual litigation in court is no substitute: "While many praise arbitration as relatively inexpensive, and geared to help persons with small claims to achieve justice, no one has seriously suggested that arbitration ensures an economically viable forum for persons with claims of five dollars, ten dollars, or even two hundred dollars." Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 80 (2000). If this Court rules that any class-action ban, no matter how onerous, is enforceable so long as it is included in an arbitration agreement, it will be a simple matter for businesses to prevent the effective enforcement of consumer rights. As one commentator put it: "Any transaction that may be cemented with the click of a mouse is susceptible to a class action waiver." Myriam Gilles, *Opting Out of*

Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 377 (2005).

Amici agree with and will not repeat respondents' arguments about the scope of FAA preemption. Instead, relying on their collective experience, amici take this opportunity to explain why the availability of aggregate litigation (whether in court or in arbitration) is often essential to secure compensation for consumers and to hold businesses responsible for unlawful practices. The FAA does not entitle businesses to insulate themselves from effective redress.

ARGUMENT

AGGREGATE ACTION IS OFTEN ESSENTIAL TO SECURE RELIEF FOR CONSUMERS AND TO HOLD BUSINESSES ACCOUNTABLE FOR WRONGDOING.

A. Businesses Have Adopted Class-Action Bans to Prevent Consumers from Bringing Legitimate Claims.

Petitioner's amici draw a false comparison between the pace and efficiency of a single individual arbitration and that of classwide proceedings. *See, e.g.*, Chamber of Commerce Brief ("Chamber Br.") 12-16; Center for Class Action Fairness Brief ("CCAF Br.") 4, 23-26. The proper comparison is between the claims of hundreds or thousands of individuals pursuing separate arbitrations and a class action. No one would argue that it is faster, more efficient, and more economical to arbitrate *thousands* of separate claims than to proceed with one class action. As one district court put it in applying Delaware law to invalidate a class-action ban: "If even a

tiny fraction of the 67,000,000 cardholders who [plaintiff] seeks to represent were to pursue a similar claim on an individual basis, the costs to Chase would be astronomical." *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1370 (S.D. Fla. 2009) (noting that class-action ban may keep Chase's costs down, "but only because it precludes the company from having to defend against allegations of wrongful conduct").

As AT&T and other businesses well know, the real alternative to aggregate action is *not* thousands of individual claims, but no cases at all. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). Recognizing that reality, businesses made a concerted effort in the 1990s to adopt mandatory arbitration clauses foreclosing class actions to eliminate their exposure to claims of any sort. *See, e.g.*, Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator?*, 7 Bus. L. Today 24, 26 (1998) (urging lenders to impose arbitration in financial-services contracts because, "[s]tripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue"). *See generally* Gilles, 104 Mich. L. Rev. at 396-99 (describing corporate strategy of adopting arbitration to avoid class actions).

Telling evidence that businesses prohibit class actions to prevent rather than facilitate consumer redress comes from an empirical study of 26 consumer contracts and 164 nonconsumer contracts from large corporations, including AT&T. The study found that, although 75 percent of the consumer agreements

provided for mandatory arbitration and barred class actions, only 6 percent of the negotiated nonconsumer, nonemployment contracts contained arbitration clauses—a highly statistically significant difference. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 876, 882-84 (2008). The data established that the companies "overwhelmingly selected arbitration as the method for resolving consumer disputes and permitted litigation as the method for resolving business disputes." *Id.* at 883. The authors concluded that the studied businesses "do not view consumer arbitration as offering a superior combination of cost savings, expeditious decision-making, consistency, and justice" but instead "view consumer arbitration as a way to save money by avoiding aggregate dispute resolution." *Id.* at 894-95; *see also* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. Chi. L. Rev. 157, 173 (2006) (noting that in first two years after adoption of mandatory arbitration clause, credit-card issuer First USA filed 51,622 arbitration claims against customers, compared to four filed by consumers).

The danger these bans on class actions pose to the vindication of consumer rights cannot be overstated. As a growing number of courts have acknowledged in holding class-action bans unenforceable under certain circumstances, aggregate action—whether in court or in arbitration—is often imperative to protecting the rights of consumers and to forcing businesses to internalize the costs of their misconduct.

B. Aggregate Action Is Often Necessary to Vindicate Consumer Rights and to Hold Businesses Responsible.

Case books are brimming with class actions that have been brought to vindicate important federal and state consumer-protection statutes in a wide array of contexts, including telecommunications; mortgage, payday, auto, or other loans; title insurance; cable and other home-related services; debt collection; credit cards; consumer purchases; car rentals; rent-to-own services; and others. These actions, which often aggregate numerous small claims, *see* Rand Study 16, 420 (in five of six consumer class actions studied, average loss probably under $1,000),[2] probably could not have been pursued

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[2] *E.g.*, *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (misrepresentation of credit-card rewards program, implicating <5% of cardholder's credit-card balance); *Ramirez v. Greenpoint Mortgage Funding, Inc.*, 2010 U.S. Dist. LEXIS 76302, at *50 (N.D. Cal. July 20, 2010) (racially discriminatory mortgage markups, with average 5-year recovery per loan of about $600-$1,100); *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 296 (E.D. Pa. 2007) ($169.89 overpayment on title insurance); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529, 535 (Ala. 2002) (claim under $500 for termite-control services); *Ford v. ChartOne, Inc.*, 908 A.2d 72, 78 (D.C. 2006) (charges totaling $38.16 to copy medical records); *Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 719 (D.C. 2003) (excessive $5 cable-service late fee); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 572 (Fla. Dist. Ct. App. 1999) (wrongful $4.50 charge on long-distance calls); *Feeney v. Dell Inc.*, 908 N.E.2d 753, 764 (Mass. 2009) (damages of $13.65 and $215.55 in challenge to sales-tax collection); *Ruhl v. Lee's Summit Honda*, 2010 Mo. LEXIS 200, at *6 (Mo. Aug. 31, 2010) ($600 potential recovery in challenge to car-financing document-preparation fees); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1217 (N.M. 2008) (misrepresentation causing $10-$20 loss per computer); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d

individually if the contracts had included an arbitration clause with an enforceable class-action ban.

AT&T's own experience bears this out. Few individuals invoke AT&T's allegedly consumer-friendly arbitration clause. As the district court found, of AT&T's then-70 (now 90) million customers, only 570 filed demands for arbitration against AT&T during the period its revised arbitration agreement was in place, and AT&T identified no claims for deceptive advertising. Pet. App. 23a, 44a. Similarly, in *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009), the court had "tangible evidence" that "defendants' 'pro-consumer' provisions" were not having their alleged "intended effect," given that fewer than 200 consumer arbitrations involving AT&T or Cingular had been conducted nationwide since 2003.

In finding bans on class actions unconscionable, courts frequently have relied on consumers' inability to bring separate claims (whether in court or arbitration) because of economic infeasibility, lack of knowledge or incentive, or the inability to attract competent counsel, as well as on the resulting immunity conferred on businesses for wrongful conduct.

1. Consumer Lack of Awareness or Incentive to Vindicate Rights. In *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263-76 (Ill. 2006), the Illinois Supreme Court held Cingular's class-action ban unconscionable

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693, 695 (N.Y. App. Div. 1986) (average $31 car-rental overcharge), *aff'd*, 509 N.E.2d 347 (N.Y. 1987); *In re Consol. Mortgage Satisfaction Cases*, 780 N.E.2d 556, 557 (Ohio 2002) ($250 in damages per mortgagor).

under Illinois law. Recognizing the practical obstacles to litigating individual challenges to the company's $150 early-termination fee, the court observed that "[t]he typical consumer may feel that such a charge is unfair, but only with the aid of an attorney will the consumer be aware that he or she may have a claim that is supported by law, and only with the aid of an attorney will such a consumer be able to make the merits of such a claim apparent in arbitration or litigation." *Id.* at 268.

In *Scott v. Cingular Wireless*, for example, a class of customers alleged that Cingular had overcharged them between $1 and $45 per month in unlawful roaming and hidden charges. The Washington Supreme Court held the class-action ban embedded in the contract's arbitration clause unconscionable under Washington law because "it effectively denies large numbers of consumers the protection of Washington's Consumer Protection Act . . . and because it effectively exculpates Cingular from liability for a whole class of wrongful conduct." 161 P.3d 1000, 1003 (Wash. 2007); *see also id.* at 1005-08. The court recognized that "[c]lass actions are vital where the damage to any individual consumer is nominal" and that this "vital piece" was exactly what the plaintiffs claimed the class-action ban "seeks to eviscerate." *Id.* at 1006. Importantly, the court recognized that, without class actions "many consumers may not even realize that they have a claim. . . . The class action provides a mechanism to alert them to this fact." *Id.* at 1007; *see also Gentry v. Super. Ct.*, 165 P.3d 556, 566 (Cal. 2007) (class-action bans in wage-and-hour cases are frequently exculpatory in part because "individual employees may not sue because they are unaware that their legal rights have been violated");

Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006) ("[W]ithout the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged."); *accord Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 747 (Wis. Ct. App. 2007). Class actions "enable even the unaware to be joined in lawsuits instituted on their behalf." Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 12 (2005) (citing successful class action brought by Medicare recipients denied reimbursements without notice or due process, many of whom were unaware of denials).

Challenging a business practice (whether in court or in arbitration) is often time-consuming and daunting for consumers. Most consumers do not have immediate access to a lawyer even if they can afford to seek advice. Low-income consumers, especially, have less flexibility in scheduling and can ill-afford to take time off from work to pursue claims. These real-world costs (apart from ignorance of legal rights or inability to pay attorney fees) prevent consumers from pursuing small claims. *See Reuter v. Davis*, 2006 WL 3743016, at *4 (Fla. Cir. Ct. Dec. 12, 2006) ("[P]arents working from payday to payday with babysitting, transportation, and employment issues, do not necessarily think they can afford attorneys or, if they do, have difficulty keeping appointments."). So it is unsurprising, for example, that, of the nearly 25 million adults affected by consumer fraud in one year, *see supra* p. 2, only 8.4 percent complained to a federal, state, or local agency or Better Business Bureau, and 2.4 percent consulted a lawyer or

other professional. FTC, *Consumer Fraud in the United States* E-6, 80-81, *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

In *Muhammad*, the New Jersey Supreme Court recognized not only the lack of knowledge but lack of incentive for consumers to pursue small recoveries. There, a plaintiff who had paid finance charges totaling $180 for three payday loans, at an annual interest rate exceeding 600 percent, brought a class action attacking such transactions under New Jersey's consumer-protection statutes. 912 A.2d at 91. After conducting "a careful fact-sensitive examination," *id.* at 97, the court held the contract's class-action bar unconscionable under New Jersey law. The plaintiff's case involved "a small amount of damages, rendering individual enforcement of her rights, and the rights of her fellow consumers, difficult if not impossible." *Id.* at 99. As the court reasoned, "[i]n most cases that involve a small amount of damages, 'rational' consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel were willing to take the case." *Id.* at 100; *see also Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 573 (S.D. Tex. 2000) (finding class resolution for payday borrowers superior in part because of "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually").[3]

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[3] Commentators have echoed these observations. *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 Law & Contemp. Probs. 75, 88 (2004)

2. **Inability to Attract Counsel.** The obstacles to securing competent counsel to pursue small claims, even in arbitration, can be prohibitive. *See* Issacharoff & Delaney, 73 U. Chi. L. Rev. at 170 ("Even low-cost arbitration may be too expensive to justify initiation of a claim against a seller unless the expected recovery is significant.") (citation omitted); Burch, 31 Fla. St. U. L. Rev. at 1027 (most lawyers refuse to take "negative value" individual claims). For instance, the small claims at issue in *Scott*, the court determined, were "impracticable to pursue on an individual basis *even in small claims court, and particularly in arbitration.*" 161 P.3d at 1007 (emphasis added). Indeed, the court noted that *no* claims from Washington customers had been arbitrated against Cingular *in the preceding six years. Id.*

("[O]ften consumers do not know that a potential defendant's conduct is illegal. When they are being charged an excessive interest rate or a penalty for check bouncing, for example, few know or even sense that their rights are being violated. Nor, given the relatively small amounts at stake, would most consumers find it worthwhile to seek legal advice to determine whether this is the case.") (footnote omitted); Thomas Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 Fla. St. U. L. Rev. 1005, 1027 (2004) (because many consumers are unaware of potential claims against companies, allowing companies to force individual resolution of claims "will significantly reduce their exposure to liability from corporate wrongdoing"). Given this informational asymmetry and lack of meaningful consumer choice, *see* CTIA Br. 8 (most wireless carriers' nationwide service agreements limit arbitration to individual claims), the Center for Class Action Fairness's claim that if class actions are better for consumers than individual arbitration, "the market will make them available," CCAF Br. 4, 27, is plainly wrong.

Similarly, in invalidating an arbitration clause's class-action ban in *Reuter*, a case challenging usurious payday loans, the court found that "[t]he chance that [plaintiff] could have obtained competent counsel absent the possibility of class action status or successfully recognized a potential claim that she could effectively pursue without benefit of counsel is *effectively zero*." 2006 WL 3743016, at *5 (emphasis added). The court emphasized that among the 66,000+ customers who completed over 1 million transactions with annual interest rates exceeding 45 percent over a five-year period, "none has brought an individual claim." *Id.* at *4.

In *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), a substantial trial record was made on the feasibility of customers arbitrating individual claims against AT&T. The court specifically found that "[i]t would not have been economically feasible" for consumers to have pursued previous class actions against AT&T "on an individual basis, *whether the case was brought in court or in arbitration*." *Id.* at 918 (emphasis added). Indeed, it was "undisputed that the lawyers who represented the plaintiffs in these cases would not have taken them if the only claim they could have pursued was the claim of the individual plaintiff." *Id.*; *see also Brewer v. Mo. Title Loans, Inc.*, 2010 Mo. LEXIS 202, at *11-*12 (Mo. Aug. 31, 2010) (holding class-arbitration ban unconscionable and pointing to expert testimony from consumer lawyers that chances of finding attorney were "virtually nil" given "small damages at issue," "complicated nature of the case," and "likelihood of a heavily defended defendant"); *Coneff*, 620 F. Supp. 2d at 1257 (citing evidence that "the

relatively small amount in controversy makes cases against large corporations such as AT&T impractical to pursue on an individual basis" and that lawyers "would not represent the named Plaintiffs in individual actions, *either in court or in arbitration*") (emphasis added).

Attorney-fee provisions, a business's commitment to pay arbitration fees, and access to small-claims court do not solve the problem of small individual claims. As the New Jersey Supreme Court observed, the "availability of attorney's fees is illusory if it is unlikely that counsel would be willing to undertake the representation." *Muhammad*, 912 A.2d at 100 ("One may be hard-pressed to find an attorney willing to work on a consumer-fraud complaint involving complex arrangements between financial institutions of other jurisdictions when the recovery is so small."); *see also Scott*, 161 P.3d at 1007 ("Shifting the cost of arbitration to Cingular does . . t seem likely to make it worth the time, energy, and stress to pursue such individually small claims.");[4] *cf. Delta Funding Corp. v. Harris*, 912

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[4] *See also Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1289 (D. Ariz. 2006) (finding "no indication" that "attorney fees are an adequate substitute" for class-action mechanism or that they "ameliorate the problems" posed by class-action bans) (citation omitted); *Feeney*, 908 N.E.2d at 764-65 (availability of attorney's fees, damages, and multiple damages "not sufficient to ensure that a consumer or business with a small-value claim will be able to find an attorney willing to take the case absent the ability to aggregate claims"); *Coady*, 729 N.W.2d at 747 n.15 (access to small-claims court not significant given doubts that attorneys would be willing to take individual small-claims cases or that plaintiffs could effectively represent themselves in small-claims court against multimillion-dollar national corporations).

A.2d 104, 115 (N.J. 2006) (rejecting challenge to class-arbitration ban where plaintiff sought more than $100,000 in damages).

That the possibility of a fee recovery does not provide adequate incentive for most lawyers to accept individual consumer cases is particularly true when fees and costs are likely to dwarf the recovery, making it less likely that a lawyer will be compensated adequately to bring the claim. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("results obtained" factor an important consideration in determining attorney-fee award); *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 n.21 (1st Cir. 2006) ("In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court."). "[P]ractically, attorneys are generally unwilling to take on individual arbitrations to recover trivial amounts of money." *Scott*, 161 P.3d at 1007.

3. **Corporate Accountability.** Because aggregate action is sometimes the only means by which consumers can vindicate their rights, it follows that "permitting the proponent of [a contract of adhesion] to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable." *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W. Va. 2002) (invalidating arbitration clause barring class actions as unconscionable under West Virginia law in

challenge to unauthorized addition of $8.44 in insurance to jewelry purchase). In short, a class-action ban potentially "gives defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud." *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 951 (Or. Ct. App. 2007).[5]

Accordingly, respected treatises and many other commentators have emphasized that deterrence is a significant—if not the chief—purpose served by class actions. *See, e.g.*, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:36, at 314 (4th ed. 2002) ("Class actions were designed not only to compensate victimized members of groups . . . , but also to deter violation of the law, especially when small individual claims are involved."); National Association of Consumer Advocates ("NACA"), *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, Guideline 1 (2006) (a "focus on individual compensation misses a central point of class actions: deterring misconduct by the defendants"), *reprinted in* 255 F.R.D.

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[5] *See also Powertel*, 743 So. 2d at 576 ("The arbitration clause . . . effectively removes Powertel's exposure to any remedy that could be pursued on behalf of a class of consumers."); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 98 (Mo. Ct. App. 2008) ("Individualizing each claim absolutely and completely insulates and immunizes [the company] from scrutiny and accountability for its business practices and 'also serves as a disincentive for [the company] to avoid the type of conduct that might lead to class action litigation in the first place.'") (citations and internal quotation marks omitted); *Coady*, 729 N.W.2d at 747 ("[T]he prospect of class-wide relief 'ordinarily has some deterrent effect on a manufacturer or service provider,' but any such effect is eviscerated by arbitration clauses like Cross Country's.") (citation omitted).

215 (2009); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043, 2047, 2056-74 (2010) (small-stakes class actions serve only deterrence, not insurance, function).

These judicial and scholarly observations about the important accountability-function served by class actions are grounded in both economics and common sense. The Chamber of Commerce, however, contends that class actions do not discourage corporate misconduct. Chamber Br. 4-10. Nonsense. Class actions can induce compliance with the law in a way that individual litigation often cannot. As the California Supreme Court correctly observed in considering a class-action ban in an employment arbitration agreement:

> While employees may succeed under favorable circumstances in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of "random and fragmentary enforcement" of the employer's legal obligation to pay overtime. . . . In other words, absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime.

Gentry, 165 P.3d at 567 (citations omitted); *see also* Sternlight & Jensen, 67 Law & Contemp. Probs. at 90 (expressing skepticism that successful individual suits lead companies to change their policies, given that a company "may find it worthwhile to pay off a few individual claims but keep its overall policy"). It is more

profitable for a business to pay $100 to the few able to navigate the judicial or arbitration systems without a lawyer than to stop illegal practices that net thousands or millions of dollars a year.

Empirical research confirms that class-action lawsuits shape corporate conduct. In the Rand study, for example, corporate representatives interviewed by researchers admitted that class actions had "played a regulatory role by causing them to review their financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions." Rand Study 9, 119. These accounts corresponded with changes in businesses practices. In all six consumer cases studied, the litigation was associated with changes in practice, and in four of the six, "the evidence strongly suggest[ed] that the litigation, directly or indirectly, produced the change in practice." *Id.* at 431.

Of course, obtaining monetary awards from defendants is not the only way to secure institutional change. "[T]he primary remedy sought in any small claims class action is often equitable in nature, making the payment of money to individual class members secondary to the far-more-valuable prospective relief." NACA Class Action Guideline 1. AT&T's clause foreclosing class actions, however, also bars injunctive relief extending beyond a customer's "individual claim." Pet. App. 61a.

A ground-breaking series of class actions that challenged racial discrimination in car financing is paradigmatic of the systemic change that classwide

treatment can achieve. Beginning in 1998, class actions brought under the Equal Credit Opportunity Act against virtually all major automotive lenders attacked practices permitting subjective and racially discriminatory dealer-markups of car-financing rates.[6] Lenders had allowed dealers to negotiate loans at rates higher than the rates at which the lenders were willing to extend the buyers credit and then rewarded the dealers for the markups. The buyer was not told that the dealership was marking up and profiting on the loan. Until the class actions were filed, many lenders had loan programs that placed no limits on how much dealers could increase the interest rates. *See* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 Cal. L. Rev. 669, 693-94 (2007) (describing industry lending practices).

Between 1993 and 2004, these subjective dealer markups cost African-American buyers on average between $347 and $508 more than whites in subjective markups. Mark A. Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation*, Vanderbilt University Law School, Law & Economics, Working Paper Number 07-01, at 13 (Dec. 2006), *available at* http://ssrn.com/abstract=951827; *see also Coleman v. GMAC*, 196

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[6] *See, e.g., Cason v. NMAC*, No. 3-98-0223 (M.D. Tenn.); *Coleman v. GMAC*, No. 3-98-0211 (M.D. Tenn.); *Smith v. Chrysler Fin. Co.*, No. 00-6003 (DMC) (D.N.J.); *Jones v. Ford Motor Credit Co.*, No. 00-CIV-8330 (PAC) (KNF) (S.D.N.Y.); *Baltimore v. Toyota Motor Credit Corp.*, No. CV-01-05564-FMC (Mcx) (C.D. Cal.); *Borlay v. Primus Auto. Fin. Servs., Inc.*, No. 3-02-0382 (M.D. Tenn.); *Willis v. American Honda Fin. Corp.*, No. 3-02-0490 (M.D. Tenn.).

F.R.D. 315, 320 (M.D. Tenn. 2000) (for GMAC customers, African Americans allegedly charged on average $315.35 more than whites), *rev'd on other grounds*, 296 F.3d 443 (6th Cir. 2002).[7]

Settlements of these class actions achieved significant equitable relief—such as caps on dealer markups; offers of pre-approved, no-markup loans to hundreds of thousands of African American and Hispanic customers; and disclosure and consumer education programs. *See* Ayres, 95 Cal. L. Rev. at 704-16 (describing key settlements); Cohen, *Imperfect Competition* 33-34 (same); National Consumer Law Center, Auto Finance Discrimination (links to settlement documents in several auto-finance class actions), http://www.nclc.org/litigation/case-index-closed-cases.html. An estimated 1.4 million African-American car financers benefited, in an amount exceeding $800 million. Ayres, 95 Cal. L. Rev. at 716.

Equally important, the litigation "reshaped loan pricing throughout the industry." *Id.* at 714-15 (documenting the chronology of reform in industry practice); Cohen, *Imperfect Competition* 37-40 (describing resulting market changes). Such fundamental reforms of an entire industry could have been accomplished only through classwide proceedings—and could have been evaded by adding arbitration clauses foreclosing class actions to car-financing contracts.

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[7] Professors Ayres and Cohen served as expert witnesses for the plaintiffs in several of these cases.

C. Attacks on Class-Action Abuses Are Exaggerated and Irrelevant.

AT&T and its amici attack class actions as flawed and the lawyers who bring them as essentially corrupt. *See, e.g.*, Petitioner's Br. 46 n.14; Chamber Br. 7-11, 17-19; CCAF Br. 6, 11-22.

These criticisms have nothing to do with the question presented here. Congress did not enact the FAA to regulate the conduct of class-action litigation. The existence of some abuses is a reason to correct them, not to eliminate class actions entirely, and courts and arbitrators have ample authority to supervise classwide proceedings. Every instance of class-action abuse is matched by multiple examples of class-action successes, and, as discussed above, aggregate litigation often affords the *only* effective means for consumers to obtain redress and to hold businesses accountable for misconduct. Indeed, even while it modified the rules governing them, Congress made the judgment that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 2(a)(1) (2005).

In any event, empirical research demonstrates that the broadside attacks against class actions and the lawyers who bring them are either exaggerated or not borne out by the facts. We address several of the key arguments below.

1. Class Actions as Blackmail. AT&T and its amici repeat what is dogma for class-action opponents—that many class actions are essentially strike suits that coerce defendants to settle even when the plaintiff's claim has little merit. *See* Petitioner's Br. 46 n.14; Chamber Br. 8-9. Both the blackmail claim and its related premise—that "almost all class actions settle," Chamber Br. 9 (quoting Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002))—have little basis in reality.

In its study of class-action litigation in four federal district courts and in later research as well, the FJC found that class and nonclass settlement rates were comparable; that class actions could not successfully be deployed as strike suits because defendants generally had a reasonably prompt chance to test the merits; and that there was no objective evidence that settlements were coerced even by class-certification decisions. *See* Willging et al., *Empirical Study* 7-10, 32-34, 60-62, 89-90; *see also* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 645-50 (2006).

A basic premise of the "blackmail," or "strike suit," charge is that defendants are coerced into settling meritless class actions because they lack "a cost-effective opportunity to litigate the merits." Willging et al., *Empirical Study* 32. Yet the FJC found that defendants generally had an opportunity to obtain a judicial ruling on dispositive motions in a reasonably timely manner. *Id.* at 34. Approximately two thirds of

cases had rulings on a motion to dismiss or for summary judgment or a sua sponte dismissal order. *Id.* at 32. Three fifths of cases were dismissed or had summary judgment granted in whole or in part in two districts and two fifths in the other two districts. *Id.* at 33.

As a result, for at least one third of cases, "judicial rulings on motions terminated the litigation *without a settlement, coerced or otherwise*." *Id.* at 34 (emphasis added). A 2005 study by the FJC (of cases filed in, removed to, and remanded by federal courts) found that federal and state courts certified 24 percent of cases as class actions and that most cases not certified were terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' individual claims. Willging & Wheatman, 81 Notre Dame L. Rev. at 606-07. The frequency and success of rulings on dispositive motions and relative infrequency of class certification dispel the myth that the mere filing of a class action exerts undue pressure on defendants to settle.

Cases certified as class actions are even more rigorously tested. In the 1996 FJC study, more than two thirds of certified class actions in the four districts had rulings on a motion to dismiss, motion for summary judgment, or both, leading the FJC to conclude that the prevalence of judicial rulings and active case management "greatly diminishes the likelihood that the certification decision itself, *as opposed to the merits* of the underlying claims, coerced settlements with any frequency." Willging et al., *Empirical Study* 61 (emphasis added). Of course, "[n]othing is self-evidently wrong with a settlement that occurs because a defendant

fears losing at trial. Settlements occur everyday for this reason, and no one questions their desirability." Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1359 (2003). The potential for a loss on the merits is always a primary factor affecting a defendant's willingness to settle. The only difference here is that a class-action defendant faces liability for wrongs done to a multitude rather than just to one individual.

Even the claim that all *certified* class actions settle, *see* Chamber Br. 7, 9, is overstated. Willging & Wheatman, 81 Notre Dame L. Rev. at 647. In the FJC's 2005 study, almost a quarter of cases certified for trial and litigation did not result in an approved classwide settlement. *Id.* The settlement rate for certified class actions was similar to that of conventional lawsuits, with approximately 70 percent of cases filed in federal court ending in pretrial settlement. Silver, 78 N.Y.U. L. Rev. at 1401-02; Bone & Evans, 51 Duke L.J. at 1285 n.129.

In sum, the assertion that class actions unfairly coerce businesses into settlements and that this coercion nullifies whatever deterrent effect a class device might have, *see* Chamber Br. 10, is not supported by the facts. And to the extent that class certification exerts what is usually *deserved* settlement pressure, the 1998 addition of subsection (f) to Federal Rule of Civil Procedure 23, authorizing discretionary interlocutory appeals from the grant or denial of class certification, diminishes it. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004); *see also* Fed. R. Civ. P. 23, 1998 advisory comm. note. And, while certification may induce some defendants to settle, the *denial* of class certification is just as likely to

create "hydraulic" pressures on *plaintiffs*, "causing them to either settle or—more likely—abandon their claims altogether." *Klay*, 382 F.3d at 1275.

2. Excessive Attorney Fees Relative to Class Recoveries. Another totem for AT&T and its amici is that class lawyers reap huge fees from class settlements that leave class members with "pennies on the dollar" or worthless coupons (particularly non-transferable coupons with no market value). *See* Petitioner's Br. 46 n.14; Chamber Br. 18-19; CCAF Br. 6, 11-22. We agree that some class settlements have unreasonably enriched lawyers and provided insufficient benefits to the class. Indeed, our amici stand at the vanguard of efforts to provide guidance to class-action lawyers to help them maximize class recoveries. *See, e.g.*, NACA Class Action Guideline 4 (urging that coupon settlements "should generally be avoided"). But AT&T and its amici significantly overstate the problem.

First, "pennies on the dollar" recoveries: In examining the incidence of so-called "two-dollar" class-member recoveries, the FJC's 1996 study focused on class actions in four districts that produced an average distribution per class member under $100. There were only nine such cases over the two-year period studied, eight of which were securities cases. Willging et al., *Empirical Study* 14. None involved "two-dollar cases," which led the FJC to conclude that "[t]he absence of such nominal recoveries in the four districts suggests that the anecdotal cases on which the discussion was based, which presumably arose in other districts, may represent outlier cases at the bottom of the range of class action recoveries." *Id.* The FJC did not find

"recurring situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees." *Id.* at 11, 77.

Second, coupon settlements: Even before Congress limited the incentive to negotiate them by linking attorney-fee awards to the value of coupons redeemed, 28 U.S.C. § 1712, the prevalence of coupon settlements had sharply dropped because of increased judicial scrutiny. *See* NACA Class Action Guideline 4 (citing, *e.g.*, *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995)). The FJC's 2005 pre-CAFA study reported that transferable coupons were the sole recovery in only 4 percent of class actions studied and that in only two cases (1 percent), were nontransferable coupons the sole class remedy. Willging & Wheatman, 81 Notre Dame L. Rev. at 651; *accord* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1739 (2008).

Third, attorney fees: Although the Rand study found that, in three of six consumer cases studied, class counsel received more than the total class recovery, Rand Study 437, broader empirical studies have determined that "[i]n most cases, net monetary distributions to the class exceeded attorneys' fees by substantial margins," Willging et al., *Empirical Study* 11, 69; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. of Empirical Legal Stud. 248, 250, 253-55 (2010) (overwhelmingly important determinant of attorney fee is size of class recovery).

Even the Rand study found that, overall, in considering actual dollars paid out, class counsel received one third or less than the actual settlement value in six of the ten total cases studied. Rand Study 435. More importantly for present purposes, the Rand study concluded that, because the average loss in the consumer cases was less than $5,000 and in five of six cases probably less than $1,000, "[i]t is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense." *Id.* at 420 (footnote omitted). Indeed, the report emphasizes that in all of the cases studied, "class members would not likely have received any monetary compensation absent a class action or some other form of aggregation." *Id.* at 467. Again, if arbitration clauses containing class-action bans had been inserted in the contracts in these cases, then *no* relief for class members would have been achieved, and the companies would have had no incentive to alter their behavior—as the study found that they had. *See id.* at 9, 119, 431.

Empirical research has also repeatedly established that the average attorney-fee award in class actions hovers at one third or less of the total settlement—comparable to or even lower than the traditional one-third rate for contingency-fee nonclass litigation. Willging et al., *Empirical Study* 90 ("Based on anecdotal evidence, we expected to find a high level of abuse in the form of attorneys' fees that were disproportionate to the class recoveries. Instead we found that attorneys' fees were generally in the traditional range of approximately one-third of the total settlement."); *id.* at 69 (fee-recovery rate infrequently exceeded traditional 33.3% rate, with median rates ranging from 27% to 30%);

Willging & Wheatman, 81 Notre Dame L. Rev. at 651 (2005 FJC study finding that attorney fees and expenses typically 29% of total recovery).

This finding is particularly robust, having been confirmed by recent ambitious studies. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 1, 4, 27 (forthcoming 2010; manuscript pagination) (mean and median attorney-fee awards using percentage-of-settlement method were about 25%), *available at* http://ssrn.com/abstract_id=1442108; Eisenberg & Miller, 7 J. Empirical Legal Stud. at 260, 262 (overall mean and median fee-to-recovery ratios were 24% and 25%, respectively, and 25% and 20% for consumer class actions). State courts award lower-than-average percentage fees, with a mean fee-to-recovery ratio of 20 percent. Eisenberg & Miller, 7 J. Empirical Legal Stud. at 259, 261.

Significantly, Eisenberg and Miller's research documents a substantial "scaling effect"—that class counsel receive a smaller proportion of the recovery as recovery size increases—over the 15-year period studied. *Id.* at 263-64. That scaling effect confirms that aggregate litigation produces "the kind of efficiency hoped for." *Id.* at 279. Only with aggregate litigation can consumers hope to exploit the same scale economies as businesses litigating the same disputes.

Consumers, not lawyers, reap the overwhelming share of class-action recoveries. One major study of 1,120 class actions showed that for every dollar recovered in common-fund class actions, 18.4 cents went to attorneys for fees and other costs, and 81.6 cents went

to class members, "which should seem to be a pretty good deal for class members." Stuart J. Logan et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports 169 (Apr. 2003). Professor Fitzpatrick's study of 688 class settlements found that the "perennial concern with class action litigation" that "class action lawyers are reaping an outsized portion" of class recoveries "may be exaggerated" because only 13 percent of the total settlement amount in 2006, and 20 percent of the amount in 2007, went to class-action lawyers in fee and expense awards. Fitzpatrick, 7 J. Empirical Legal Stud. at 23-24 (manuscript pagination). The attacks on class actions and the lawyers who bring them are, again, based more on atypical anecdotes than on empirical evidence regarding general practice.

3. **Government Enforcement Authority.** Government enforcement authority does not render classwide litigation unnecessary. *See* Chamber Br. 3, 5-6; Am. Bankers Ass'n Br. 21-29. As this Court has recognized, "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries *unremedied by the regulatory action of government*." *Deposit Guar. Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 339 (1980) (emphasis added). The argument that regulatory enforcement is sufficient is also at odds with clear legislative intent in California and elsewhere to authorize private enforcement of consumer and employee protections. *See, e.g.*, *Feeney*, 908 N.E.2d at 765 (as purposes of Massachusetts' consumer-protection statute reflect, "availability of the Attorney General's enforcement authority is . . . not sufficient to ensure that the goals of the statute are realized").

The fact is, "in practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations." Rand Study 69. That is true of federal as well as state agencies. In 2009, the Consumer Sentinel Network, an online database of consumer complaints made to the FTC, Better Business Bureaus, and other agencies and organizations, received more than 1.3 million consumer complaints—over 720,000 fraud-related. FTC, *Consumer Sentinel Network Data Book for Jan. - Dec. 2009*, at 3 (2010), *available at* http://www.ftc.gov/sentinel/reports/sentinel-annualreports/sentinelcy2009.pdf. Obviously, the FTC, with its staff of 1,100 employees, *see* FTC, *Performance and Accountability Report, FY 2009*, at III, *available at* http://www.ftc.gov/opp/gpra/2009parreport.pdf, lacks the resources to investigate and respond to this volume of complaints, and so it depends on supplemental private enforcement. *See* FTC's Thomas B. Leary Addresses Class Action Litigation Summit (2003) ("The Federal Trade Commission is a relatively small agency with broad competition and consumer protection responsibilities. . . . We depend on private litigation to supplement our efforts, and therefore, we have a direct interest in the way that class actions are administered."), http://www.ftc.gov/opa/2003/06/learyspeech.shtm; *see* Rand Study 69-70 (citing examples of regulatory agencies relying explicitly on private actions to augment their efforts).[8]

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[8] *See also Cooper*, 503 F. Supp. 2d at 1289 ("The mere possibility that a state agency may at some time file an enforcement action should not preclude Plaintiff and other similarly situated consumers

Equally telling is a recent article by a Food and Drug Administration ("FDA") official, who advised the food industry that the FDA could not possibly respond to most deceptive food claims. "Going after them one-by-one with the legal and resource restraints we work under is a little like playing Whac-a-Mole . . . ." Expressing doubts that it would bring enforcement actions, given "FDA's finite resources," the official "call[ed] on the food industry to exercise restraint" and invited scrutiny by the Center for Science in the Public Interest and the media. Michael Taylor, *How the FDA Is Picking Its Food Label Battles*, The Atlantic (2010), http://www.theatlantic.com/food/print/2010/07/how-the-fda-is-picking-its-food-label-battles/59927.

In the absence of governmental action, class actions can bring corporate misconduct to light and even spur public agencies to act. *See, e.g.*, *Wilson v. Airborne, Inc.*, 2008 U.S. Dist. LEXIS 110411, at *4, *10, *35 (C.D. Cal. Aug. 13, 2008) (approving creation of $23.25 million non-

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from seeking a legal remedy . . . ."); *Ting*, 182 F. Supp. 2d at 920 (rejecting argument that FCC is forum before which class members can "effectively vindicate" right to recover damages from AT&T); *Gentry*, 165 P.3d at 569 (rejecting argument that availability of enforcement by Labor Commissioner is "adequate substitute for classwide arbitration"); *Kinkel*, 857 N.E.2d at 276 (state attorney general's authority to bring action insufficient, given office's need to allocate "scarce resources to a variety of issues affecting consumers"); *Vasquez-Lopez*, 152 P.3d at 950 ("possibility of state action cannot reliably serve as a substitute for private actions," given attorney general's contention that amount of consumer fraud in state "far exceeds" ability to investigate and prosecute it); *Scott*, 161 P.3d at 1004 (noting declaration by consumer-protection chief that attorney general's office lacked "sufficient resources to respond to many individual cases" and often relied on private class actions).

reversionary settlement fund in nationwide class action brought by purchasers of Airborne, a product that falsely touted it was a "Miracle Cold Buster" that could ward off a cold after onset, and using a fee multiplier of 2.0 in part because case "may have been a factor in a subsequent investigation by the [FTC] and the attorneys general of many states"); FTC Press Release (Aug. 14, 2008) (FTC complaint and agreed-upon final order followed settlement of *Wilson* class action), *available at* http://www.ftc.gov/opa/2008/08/airborne.shtm. But by inserting into its packaging a mandatory arbitration clause with a class-action ban, Airborne potentially could have avoided accountability (public or private).

4. Supposed Consumer Cost-Savings. Finally, petitioner's amici argue that class-action bans in arbitration clauses are economically beneficial to consumers because the alleged cost-savings to businesses are passed along to customers in the form of lower costs. CTIA Br. 12; Am. Bankers Ass'n Br. 14. That self-serving claim is baseless. Although the degree to which prohibitions on aggregate action result in lower costs to consumers is an empirical question, "so far, no empirical data exists." Burch, 31 Fla. St. U. L. Rev. at 1028; *accord* Issacharoff & Delaney, 73 U. Chi. L. Rev. at 170 n.67. And if businesses save money from class-action bans, it is only because they have denied aggrieved customers effective recourse.

The court's rejection of AT&T's cost-savings argument in *Ting* is particularly apt. The court was not prepared to assume, without evidence, that AT&T's dispute-resolution provisions produced lower charges, "since while lower costs can produce lower charges, they

can also produce higher profits." 182 F. Supp. 2d at 931 n.16. More importantly, however, "the notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws." *Id.*

We could not have said it better.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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October 6, 2010

APPENDIX

AMICI CURIAE

The Legal Aid Society of the District of Columbia, a District of Columbia non-profit organization, was founded in 1932 to "provide aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs." Legal Aid By-Laws, Art. II. Legal Aid is the oldest general civil legal service program in the District of Columbia and represents hundreds of litigants each year before the District's courts and administrative agencies. Legal Aid's consumer practice, founded in 2008, seeks to protect low-income residents of the District of Columbia from unfair, deceptive, exploitative, or otherwise unlawful consumer practices and transactions. Legal Aid is committed to ensuring that low-income consumers can effectively enforce their contractual and statutory rights. It believes that for modest consumer claims, classwide proceedings are often necessary to enable consumers to obtain redress and hold businesses accountable for misconduct.

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. AARP is greatly concerned about fraudulent, deceptive, and unfair business practices, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect older people from such business practices and to preserve the legal means for them to seek redress. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

The Center for Responsible Lending is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive consumer practices. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in financing to help more than 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

The Center for Science in the Public Interest ("CSPI") is an independent non-profit organization supported by more than 750,000 individual members as well as charitable donations and foundation grants. CSPI accepts no funding from industry or government agencies. As part of its advocacy efforts, CSPI publishes an award-winning Nutrition Action Healthletter to inform its members of health topics of interest. CSPI's litigation department has used state consumer protection laws to achieve more honest labeling of artificial ingredients and to halt deceptive marketing. Litigation, or the threat of litigation, has spurred several companies to change their practices. In many of these cases, CSPI had long sought voluntary change by the companies or action by regulators, to no avail. CSPI's experience shows that without the threat of litigation, these changes would not have happened.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)(3) organization, Consumer Action focuses on financial education that empowers low- to moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. Consumer Action was a named plaintiff in

successful court challenges to mandatory arbitration in AT&T and Bank of America consumer agreements.

Consumer Federation of America ("CFA") is an association of nearly 300 non-profit consumer organizations. CFA was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA works to advance consumer interests and pro-consumer policies by researching and reporting consumer issues and behavior, and by advocating about consumer concerns before the federal and state governments. CFA also educates the public, news media, and policymakers about consumer issues, and supports consumer-oriented organizations in their work. CFA's membership is comprised of national, state, and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations.

The National Association of Consumer Advocates ("NACA") is an association of over 1,500 consumer advocates organized to help create and strengthen state and federal laws designed to protect purchasers from unscrupulous business practices in connection with consumer transactions. NACA has established itself as one of the most effective advocates for the interests of consumers in this country. Its publication, *Standards and Guidelines for Litigating and Settling Consumer Class Actions, Revised*, 255 F.R.D. 215 (2009), serves as a reference to lawyers and judges alike.

The National Consumer Law Center, Inc. ("NCLC") is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a nationally recognized expert on consumer credit issues and has drawn on this expertise to provide information,

legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over forty years. NCLC is the author of the widely praised eighteen-volume *Consumer Credit and Sales Legal Practice Series*, which includes manuals on *Consumer Arbitration Agreements* (5th ed. 2007 and Supp. 2009) and *Consumer Class Actions* (7th ed. 2010). NCLC has been actively involved in the debate concerning mandatory pre-dispute arbitration clauses, class-action bans, and access to justice for consumers. On September 15, 2009, NCLC's Director of Litigation provided testimony to the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee on *Mandatory Binding Arbitration: Is it Fair and Voluntary?*. In April, 2010, NCLC published a report entitled *Forced Arbitration: Consumers Need Permanent Relief*. NCLC frequently is asked to appear as amicus curiae in consumer-law cases before courts around the country and does so in appropriate circumstances.

The National Consumers League's mission is to work toward social and economic justice for consumers and workers in the United States and abroad. The League believes that access to justice is an essential component of achieving social and economic justice and that the explosion of mandatory-arbitration clauses in consumer contracts, intended to constrict the public's access to the courts, is undemocratic and against the social and economic interests of both consumers and workers. Moreover, without the class-action process many, many meritorious cases would never be heard. NCL therefore supports the right of consumers and workers to band together in class actions to fight injustice.

The National Legal Aid and Defender Association ("NLADA"), established in 1911, is the largest national organization dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender systems. Among NLADA's more than 2,000 members are civil legal aid programs and legal services providers who are funded by IOLTA programs in all fifty states, the District of Columbia, and the Virgin Islands. These programs represent thousands of individuals whose rights as consumers have been violated, often by the same individual or corporation. The scarce resources of NLADA's members, and the overall interests of the clients they serve, are often most effectively and efficiently used through the pursuit of class-action relief.

Public Good is a public-interest organization dedicated to the proposition that all are equal before the law. Through amicus curiae participation in cases of particular significance for consumer protection, civil rights, and civil liberties, Public Good seeks to ensure that the protections of the law remain available to everyone. Access to class-action procedures for claims that would not otherwise be adjudicated or arbitrated exemplifies the rights that Public Good seeks to defend.

U.S. PIRG (Public Interest Research Group) is a federation of twenty-five state-based, citizen-funded, non-profit, non-partisan organizations that advocate for the public interest. With its staffs of researchers, advocates, organizers, and students, the PIRG federation supports citizen interest in opposition to commercial or governmental wrongdoing that threatens the health or safety of Americans, or violates fundamental principles of fairness and justice. Specifically, with respect to consumer rights, U.S. PIRG takes action on issues including consumer protection

from unfair and deceptive practices, unconscionable fees and charges, product safety, warranties, monopolization, investor protection, utilities regulation, healthcare, and consumer privacy. U.S. PIRG conducts investigative research, publishes reports and exposés, and advocates for legislation and regulatory changes at the local, state, and federal levels. It supports procedural rights that allow consumers to seek redress for violations of consumer protection laws and to enjoin illegal practices. The PIRG federation has been active for thirty-eight years. The federation is supported by hundreds of thousands of citizens via membership contributions and receives a significant portion of its funding from foundation grants.

AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Class-action bans are provisions in standard-form contracts that purport to bar consumers or employees from pursuing classwide proceedings in any forum. In circumstances where they would function as exculpatory clauses, class-action bans have been held unenforceable under the generally applicable contract law of twenty states—without regard to whether they are found in arbitration agreements.

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The question presented is:

> When a class-action ban that is otherwise unenforceable under generally applicable contract law is embedded in an arbitration agreement, is the contract law preempted by the FAA?

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INTEREST OF AMICUS[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that has assisted African Americans and other people of color in securing their civil and constitutional rights for more than six decades. In litigation before this Court and other courts, LDF has focused particularly upon class actions because of their effectiveness in facilitating collective action to secure systemic change. *See, e.g.*, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).

LDF also has appeared as a party and as an amicus before this Court to ensure that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, is interpreted in a manner consistent with effective enforcement of our nation's civil rights laws. *See, e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF THE ARGUMENT

American democracy depends upon robust civil rights laws that are vigorously enforced. Yet that vigorous enforcement is now threatened by the expanding reach of a novel contractual provision—one that could bar increasing numbers of individuals from pursuing class actions in any legal forum if they want to obtain a job, purchase a car, receive a loan, or enter into other contractual transactions.

AT&T Mobility invoked such a class-action ban, which was inserted in its standard-form arbitration agreement with cell-phone users, in an attempt to preclude class treatment of respondents' fraud allegations. Applying California contract law, the Ninth Circuit held that AT&T Mobility's class-action ban was unconscionable because it effectively insulated the company from the full scope of its potential liability. Pet. App. 4a-11a. While this case thus directly involves the effect of class-action bans on consumer protection law, it also could have significant implications for the continued use of class actions in the civil rights context—where they have been an indispensable tool for promoting equal opportunity.

"Civil rights and class actions have an historic partnership." Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 Ariz. L. Rev. 575, 577 (1997). Thanks to landmark class actions, ranging from *Brown v. Board of Education*, 347 U.S. 483 (1954), to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), our nation has made significant progress toward the Constitutional aspiration of a "more perfect Union." Yet discrimination undeniably persists. A brief survey of class litigation

in the past two decades challenging discrimination by large employers, mortgage lenders, insurers, and vehicle financing companies illustrates this fact. These types of cases merit attention here because they arose in contexts where class-action bans could be incorporated into contracts between the pertinent parties, thereby preventing similar actions in the future.

The reasoning that courts have used to invalidate class-action bans under the ordinary contract law of California and nineteen other states applies with particular force to civil rights. Contrary to the assertions of AT&T Mobility and its amici, isolated individual claims do not provide a meaningful alternative to class treatment. Class actions offer remedies for civil rights violations in circumstances where individuals are unlikely to proceed on their own because they lack timely notice, have insufficient resources, or fear retaliation. Not only are individual claims often too time- and resource-intensive to be realistic, but they rarely provide relief that extends beyond the named plaintiffs. By contrast, class actions serve broader public interests by effectively remedying and deterring civil rights violations and especially systemic discrimination. Public enforcement is also an inadequate substitute for class proceedings. Government regulators lack the capacity to prosecute the vast majority of cases brought to them. Moreover, their enforcement priorities shift over time.

Sophisticated businesses make decisions based on their bottom lines. If individuals who experience discrimination lack viable recourse to class actions, companies may determine that allowing widespread

civil rights violations to persist is less costly than taking corrective action. Simply put: eliminating the risk of liability for aggregated civil rights violations means that some number of those injuries will remain unredressed. The result is a less just society.

Federal law does not preclude application of ordinary state contract law to strike down class-action bans in certain circumstances. To the contrary, the Federal Rules of Civil Procedure, federal antidiscrimination statutes, and this Court have all recognized the importance of class actions to vigorous enforcement by private attorneys general, especially in the civil rights context.

Nor does the Federal Arbitration Act (FAA) preempt a court's invalidation of a class-action ban under generally applicable state law, where, as here, that ban is embedded in a standard-form arbitration agreement. The FAA provides that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Interpreting this provision, this Court has held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). California contract law, which the Ninth Circuit simply followed, does not treat a class-action ban in an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). The FAA therefore provides no grounds for reversal.

ARGUMENT

I. Class actions help ensure our nation's continued progress toward equal opportunity.

There is a "special dependence of civil rights (and other public rights) litigation on the device of the class action." Hon. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989) (hereinafter "Carter, *Federal Rules*"). Although we have made great strides as a nation, class actions remain essential to remedy the discrimination that unfortunately still persists. This is particularly apparent in employment, lending, and other contexts where class-action bans could be inserted into standard-form contracts to forestall future class proceedings.[2]

A. Many significant civil rights advances have resulted from class actions.

This Court's 1954 decision in *Brown* is but one example of how civil rights class actions have contributed to dismantling segregation and promoting equal opportunity for all Americans, regardless of their birth or background.[3] Civil rights class actions

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[2] In discussing the relationship between class actions and effective enforcement of civil rights, this amicus brief focuses primarily on race discrimination, but the arguments apply equally to combating inequities based on gender, religion, disability, and other protected categories.

[3] Three of the cases consolidated before the Supreme Court in *Brown* were federal class actions; the fourth was brought in Delaware state court. 347 U.S. at 486 n.1, 495; *see also Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) (class action decided on the same day and same grounds as *Brown*). "In the face of massive official resistance to local implementation of the Court's decision in *Brown*," class actions were critical because "the civil

have been indispensable in reducing discrimination in the economic sphere. Indeed, the first case in which this Court recognized the beneficial impact of private attorneys general in securing broad compliance with civil rights laws was a class action that successfully enjoined discrimination against African-American customers at a South Carolina restaurant chain. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400-02 (1968).

Class actions also led to many of the key employment discrimination precedents that invigorated enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See, e.g.*, *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs*, 401 U.S. 424; Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 932-33 (1978). And class actions have exposed and remedied widespread fair housing violations, such as "racial steering" by real estate brokers, *see, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363,

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rights attorney could never count on school officials to construe a court order admitting enumerated individual plaintiffs to a segregated school as an order to desegregate." Carter, *Federal Rules*, at 2186; *cf. Potts v. Flax*, 313 F.2d 284, 289 (5th Cir. 1963) ("To require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the class discrimination.").

366-70 (1982), and "redlining" by lenders who refuse to do business within predominantly minority neighborhoods, *see, e.g.*, *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 325-28 (N.D. Ill. 1995). These victories could have been more difficult to obtain if class-action bans had been commonplace in the last half century.

B. Recent cases demonstrate that class actions are still a vital tool for vindicating civil rights.

In recent years, civil rights class actions have continued to play an important role, particularly in redressing the subtle and sophisticated types of discrimination that have proved most difficult to eliminate. *Cf. Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996) ("Discrimination continues . . . and is often simply masked in more subtle forms."). Below, we provide an illustrative but non-exhaustive survey of the ongoing impact of class actions over the past two decades in employment, lending, insurance, and vehicle financing—all contexts in which class-action bans are becoming more prevalent and thus could be particularly detrimental to robust enforcement of our civil rights laws. *See, e.g.*, Br. of Amici Am. Bankers Ass'n. et al. 3 (noting prevalence of class-action bans in banks' consumer contracts); Br. of Amicus Equal Employment Advisory Council 2 (noting that member employers have adopted class-action bans for employment disputes); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 418 (2005) ("[M]any contemporary civil-rights cases, while not bottomed on contractual theories, implicate contrac-

tual relationships that are capable of communicating effective collective action waivers.").

1. Class-action bans could dramatically curtail relief for employment discrimination, which persists in far too many industries and occupations. *See, e.g.*, Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 Am. Soc. Rev. 777, 792-93 (2009) (finding that African-American applicants were half as likely as equally qualified white applicants to receive a callback interview or job offer, and minority applicants *without* criminal records fared no better than white applicants *with* records); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991, 992 (2004) (finding that applicants with distinctively white-sounding names received 50% more callbacks for interviews than equally qualified applicants with distinctively African-American names, and the gap widened for applicants with better resumes).

Over the past two decades, class actions have exposed institution-wide discrimination, won significant monetary relief for thousands of minority and female employees, and led to comprehensive and innovative reforms of employment policies at a number of leading corporations, including Abercrombie & Fitch, Coca-Cola, Eastman Kodak, FedEx, Home Depot, Morgan Stanley, Sodexho Marriott Services, Walgreens, and Xerox.[4] For instance, in a case liti-

[4] *See, e.g.*, *Davis v. Eastman Kodak Co.*, Nos. 6:04-cv-6098, 6:07-cv-6512 (W.D.N.Y. Sept. 3, 2010) (approving class settlement on behalf of over 3,000 current and former African-American employees); *Curtis Bauer v. Morgan Stanley & Co.*,

gated by amicus LDF, a district court certified a class action that resulted in significant remedies for "allegations of an overt policy of blatant racial discrimination and retaliation" at the Shoney's restaurant chain that was "developed and directed" by "top Shoney's management" and "implemented by all-white supervisory and management personnel." *Haynes v. Shoney's, Inc.*, No. 3:89-cv-30093, 1992 WL

No. 3:06-cv-3903, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) (approving class settlement on behalf of over 1,300 African-American and Latino financial advisors); *Warren v. Xerox Corp.*, No. 1:01-cv-2909, 2008 WL 4371367 (E.D.N.Y. Sept. 19, 2008) (approving class settlement on behalf of nearly 1,500 African-American sales representatives); *Tucker v. Walgreen Co.*, Nos. 3:05 cv 440, 3:07 cv 172 (S.D. Ill. Mar. 24, 2008) (approving consent decree on behalf of 10,000 African-American employees); *Satchell v. FedEx Corp.*, Nos. 3:03 cv 2659, 3:03 cv-2878 (N.D. Cal. Aug. 14, 2007) (approving class settlement on behalf of 20,000 African-American and Latino employees); *Satchell v. FedEx Corp.*, Nos. 3:03-cv-2659, 3:03-cv-2878, 2005 WL 2397522 (N.D. Cal. Sept. 28, 2005) (certifying class action); *McReynolds v. Sodexho Marriott Servs., Inc.*, No. 1:01-cv-0510 (D.D.C. Aug. 10, 2005) (approving consent judgment on behalf of 2,600 current and former African-American managers); *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 1 (D.D.C. 2004) (denying in part motion for summary judgment); *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Nos. 3:04-cv-2817, 3:04-cv-4730, 3:04-cv-4731 (N.D. Cal. Apr. 15, 2005) (approving consent decree settling claims of systemic discrimination against Latino, African American, Asian-American, and female applicants and employees); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (approving class settlement on behalf of 2,200 current and former African American employees); *Butler v. Home Depot, Inc.*, No. 3:94-cv-4335 (N.D. Cal. Jan. 14, 1998) (approving consent decree on behalf of 17,000 current and former female employees and 200,000 unsuccessful applicants); *Butler v. Home Depot, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996) (certifying class action).

752127, at *2, 20 (N.D. Fla. June 22, 1992) (certifying class action); *see also Haynes v. Shoney's, Inc.*, No. 3:89-cv-30093, 1993 WL 19915, at *6-7 (N.D. Fla. Jan. 25, 1993) (approving consent decree requiring, *inter alia*, $105 million in relief to class members and significant corporation-wide reforms).

Another recent example is *McClain v. Lufkin Industries, Inc.*, where the Fifth Circuit affirmed a district court's conclusion that a large Texas manufacturing plant's "practice of delegating subjective decision making authority to its white managers with respect to . . . promotions resulted in a disparate impact on [a class of over 700] black employees in violation of Title VII." 519 F.3d 264, 272 (5th Cir. 2008). Among the district court's findings was that "white employees have a significant advantage in gaining the skills and abilities needed to qualify them for promotion. . . . [whereas] Black employees are more likely to be placed in dead-end positions and left to seek training on their own." *McClain v. Lufkin Indus.*, No. 9:97-cv-63, 2005 U.S. Dist. LEXIS 42545, at *32-33 (E.D. Tex. Jan. 13, 2005), *aff'd in relevant part*, 519 F.3d 264 (5th Cir. 2008).

In addition to providing effective remedies for class members and company-wide reforms, these recent examples of major class actions deter further wrongdoing by signaling to the market that employment discrimination is harmful economically and to the corporate brand. Such beneficial impacts were recently acknowledged by a federal district court after it approved an "imaginative" nationwide class settlement to resolve allegations that Texaco pervasively discriminated against African-American employees and concealed evidence pertinent to the

litigation. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 189-93, 198 (S.D.N.Y. 1997) (adopting special master's report summarizing the settlement, valued at $172 million, which included, *inter alia*, the creation of a Task Force on Equity and Fairness charged with "initiating and determining the effectiveness of improvements and additions to Texaco's human resources programs and helping to monitor the progress made in such programs toward creating opportunity for African-Americans, diversity in the Texaco workforce and equal opportunity for all Texaco employees"). The court adopted the special master's conclusion that the case highlighted "the importance of private attorneys general in enforcement of the proscriptions against racial discrimination in the workplace" and "may well have important ameliorative impact not only at Texaco but in the corporate context as a whole." *Id.* at 189, 197-98.

2. Contractually based bans on class actions also could severely impede efforts to eradicate persistent discrimination in mortgage lending, insurance, and vehicle financing.

For instance, there is ample research that predatory mortgage lending has exacerbated the current economic crisis and contributed to higher foreclosure rates for African-American and Latino homeowners. *See, e.g.*, Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629, 632-34, 644-46 (2010); Debbie Gruenstein Bocian et al., *Race, Ethnicity and Subprime Home Loan Pricing*, 60 J. Econ. & Bus. 110, 121-23 (2008). A number of cases targeting such predatory practices have survived motions to dis-

miss,[5] and less than three months ago, a district court certified a nationwide class of African-American and Hispanic borrowers who allege that a mortgage lender violated the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, and the Fair Housing Act (FHA), 42 U.S.C. § 3605, "by giving its authorized brokers discretion to mark up the price of wholesale mortgage loans, a policy that led minority borrowers to be charged disproportionately high rates compared to similarly situated whites." *Ramirez v. Greenpoint Mortgage Funding, Inc.*, No. 3:08-cv-369, 2010 WL 2867068, at *1 (N.D. Cal. July 20, 2010); *see also Ramirez v. Greenpoint Mortgage Funding, Inc.*, 633 F. Supp. 2d 922, 924 (N.D. Cal. 2008) (denying mortgage company's motion to dismiss).

Recent class actions also have sought to redress pervasive discrimination in the sale of insurance. For instance, a district court recognized the "substantial and beneficial" results of a nationwide class action on behalf of approximately five million African-American and Latino customers of a leading insurance company that charged minority policyholders higher premiums for automobile and homeowners' insurance than it charged similarly situated white policyholders. *DeHoyos v. Allstate Corp.*, 240

[5] *See, e.g.*, *Guerra v. GMAC LLC*, No. 2:08-cv-1297, 2009 WL 449153, at *1 (E.D. Pa. Feb. 20, 2009); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 253 (D. Mass. 2008); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1064 (S.D. Cal. 2008); Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev. 375, 404-27 (2010) (summarizing pending litigation).

F.R.D. 269, 275, 331 (W.D. Tex. 2007). The class settlement included not only monetary relief but also a "change in the [company's] credit scoring formula, an educational outreach program, multi-cultural marketing, [and] an improved appeals process." *Id.* at 330-31; *see also DeHoyos v. Allstate Corp.*, 345 F.3d 290 (5th Cir. 2003) (affirming denial of the insurer's motion to dismiss). Other class actions have brought relief to thousands of individuals adversely affected by the previously widespread practice in the life insurance industry of targeting African Americans for policies with higher premiums and lower benefits than those offered to white customers.[6]

Contractually based bans on class actions also could have adversely affected another set of recent class actions, which exposed financial arrangements between leading vehicle financing companies and car dealerships that resulted in systematically higher mark-ups on financing for African-American and Latino purchasers than for similarly situated whites. *See, e.g.*, Caroline E. Mayer, *Car-Loan Rates Marked Up More for Blacks, Report Says*, Wash. Post, Oct. 1, 2003, at E01 (reporting study findings that "African Americans were almost three times as likely as whites to be charged mark-ups on loans financed by

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[6] *See, e.g., In re Monumental Life Ins. Co.*, 365 F.3d 408, 411-13 (5th Cir. 2004) (reversing denial of class certification); *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1211-12 (11th Cir. 2001) (affirming denial of insurer's motion for judgment on the pleadings); *Norflet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350, 353 (D. Conn. 2009) (approving class settlement); *Williams v. Nat'l Sec. Ins. Co.*, 237 F.R.D. 685, 687 (M.D. Ala. 2006) (approving class settlement); *Thompson v. Metro. Life Ins. Co.*, 149 F. Supp. 2d 38, 40-41 (S.D.N.Y. 2001) (denying insurer's summary judgment motion).

General Motors Acceptance Corp." and that this disparity could not be explained by creditworthiness or other legitimate business factors). These class actions led to industry-wide reforms, including caps on dealer mark-ups, as well as pre-approved financing for minority customers and consumer education initiatives.[7] *See also* Part II.C. *infra*.

From this brief, non-exhaustive survey, it is evident that class-action bans could prove extremely detrimental in many spheres where class actions have been successful over the past two decades in redressing civil rights violations.

II. Individual claims and public enforcement are inadequate substitutes for civil rights class actions.

In striking down class-action bans under the generally applicable contract law of twenty states, courts have emphasized the broad public interests served by class actions. *See, e.g.*, *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 764 (Mass. 2009) (noting that class-action bans "undermine[ ] the public interest in de-

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[7] *See, e.g.*, *Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330 (S.D.N.Y. June 5, 2006) (approving class settlement), *Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330, 2002 WL 88431 (S.D.N.Y. Jan. 22, 2002) (denying company's motion to dismiss); *Smith v. Daimler-Chrysler Servs. N. Am., LLC*, No. 2:00-6003, 2005 WL 2739213 (D.N.J. Oct. 24, 2005) (approving class settlement), *Coleman v. Gen. Motors Acceptance Corp.*, No. 3:98-cv-211 (M.D. Tenn. Mar. 29, 2004) (approving class settlement); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64 (M.D. Tenn. 2004) (certifying nationwide class action); Kenneth J. Rojc & Sara B. Robertson, *Dealer Rate Participation Class Action Settlements: Impact on Automotive Financing*, 61 Bus. Law. 819, 820-26 (2006) (describing settlements).

terring wrongdoing"); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1005 (Wash. 2007) ("Class remedies not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the community as a whole."); *Gentry v. Superior Ct.*, 165 P.3d 556, 556-57 (Cal. 2007). This is especially true for civil rights. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175-76 (9th Cir. 2003) (concluding that a contract prohibiting employment discrimination class actions was unconscionable under California law).

It is unrealistic to expect isolated individual actions or government regulators to fill the gaps in civil rights enforcement that may well arise if judicial review of class-action bans under state contract law is restricted along the lines that AT&T Mobility advocates. *Cf.* Pet'r. Br. 39-45. First, class actions facilitate legal redress in circumstances where individuals are unlikely to pursue claims on their own due to lack of notice, insufficient resources, or fear of retaliation. Second, the class-action device is often more effective than individual case-by-case proceedings in exposing, remedying, and deterring systemic discrimination. Third, public enforcement is an entirely inadequate substitute for class actions, since federal and state regulators have never had the resources or capacity to pursue more than a very small number of the civil rights violations that occur across the nation.

A. Class actions offer redress for individuals who otherwise might not assert their civil rights.

This Court has repeatedly recognized the impor-

tance of class actions in providing legal redress for inequities that may be too time- and resource-intensive to realistically challenge through isolated individual claims. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Even where supposedly plaintiff-friendly procedures for arbitrating individual claims may be available, class actions have key features that often are more advantageous in ensuring effective civil rights remedies.

The class certification process, as well as the public and media attention that class actions generate, broaden awareness about and expand participation in civil rights and other litigation. *See* Fed. R. Civ. P. 23(c)(2), (e). As noted by the Ninth Circuit in the decision under review and other courts reviewing the validity of class-action bans under state contract law, class actions alert potential plaintiffs who otherwise may never realize that the unfair outcomes they experienced were due to a violation of civil rights statutes or other laws, much less that these outcomes were part of a broader pattern including similar infractions of the rights of others. *See* Pet. App. 43a-45a; *Gentry*, 165 P.3d at 566-67; *Scott*, 161 P.3d at 1007; *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 97-98 (N.J. 2006).

Especially in the civil rights context, class actions also help ameliorate individuals' legitimate fears of retaliation, which may discourage them from proceeding on their own. Reflecting on his experience as a civil rights litigator, Judge Robert Carter observed that in cases "seeking to vindicate novel rights in the face of majoritarian hostility, the very ability to proceed required the institution of a class

action" because a "lone plaintiff" may be "extremely vulnerable to the pressure of intimidation." Carter, *Federal Rules*, at 2186; *see also Gentry*, 165 P.3d at 565-67 ("[F]ear of retaliation will often deter employees from individually suing their employers"); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding class certification requirements satisfied where "class members still employed by the [defendant] might be reluctant to file individually for fear of workplace retaliation").

Indeed, for individuals who have experienced discrimination and other civil rights violations, "association for litigation may be the most effective form of political association." *NAACP v. Button*, 371 U.S. 415, 431 (1963); *accord In re Primus*, 436 U.S. 412, 423-26 (1978). For instance, a sense of shared commitment among African-American workers at Duke Power in North Carolina helped catalyze the class action that led to this Court's landmark decision in *Griggs* that Title VII permits workers to challenge both intentional discrimination and "artificial, arbitrary, and unnecessary barriers to employment." 401 U.S. at 431; *see* Robert Samuel Smith, *Race, Labor & Civil Rights: Griggs versus Duke Power and the Struggle for Equal Employment Opportunity* 84-90, 113, 177-81 (2008).

Moreover, class certification prevents an action from becoming moot even if a change in the circumstances of the named plaintiff renders her ineligible for relief. *See, e.g.*, *Franks*, 424 U.S. at 753-56. Class treatment therefore diminishes a defendant's ability to strategically preempt individual claims and thereby avoid implementing structural relief—for instance by making an offer of judgment under

Federal Rule of Civil Procedure 68.[5] *See, e.g., Deposit Guar. Nat'l Bank*, 445 U.S. at 332-40 (discussing the defendant's attempt to moot a putative consumer class action by tendering the maximum recoverable amount to each individual plaintiff prior to an appeal from the denial of class certification).

Equally important, class actions serve broader goals of judicial economy by channeling multiple potential suits into a single forum. *See* Fed. R. Civ. P. 23, Advisory Committee's Note to the 1966 Amendment, *reprinted in* 39 F.R.D. 69, 102-03 (1966) (hereinafter "Advisory Committee's Note") (noting the potential for class actions to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated"); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982).

B. Class actions are uniquely effective in remedying and ultimately deterring systemic discrimination.

Class actions provide particular advantages in addressing pervasive and entrenched discrimination that separately filed cases often cannot offer. *See* Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 628 (1988) ("In both adverse impact and disparate-treatment cases, . . . the difference between the success and failure of a valid claim is often the difference between a class action

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[5] Rule 68 provides that a defendant may serve an offer of judgment on a plaintiff more than ten days before trial begins; if the plaintiff declines the offer and then receives a judgment at trial that "is not more favorable than the unaccepted offer," the plaintiff must pay costs incurred by the defendant after the offer was made. Fed. R. Civ. P. 68(a), (d).

and an individual suit."). "[B]y broadening the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform." Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678 (2003).

In many civil rights cases, most, if not all, pertinent information is within the exclusive province of the defendant –through its agents, employees, records, and documents. Discovery of this evidence—especially in challenges to institution-wide practices of large corporate defendants—is expensive; thus, the ability to spread the costs over a class is key to obtaining redress. *See, e.g., Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 997 (5th Cir. 1984) (reversing judgment against a discrimination plaintiff in order to permit broad discovery in support of a class certification motion, and observing that "[h]ad [the plaintiff]'s class claims prevailed, she would have faced a distinctively less onerous burden at the trial of her individual claim").

Without broad discovery of company-wide statistical and other data that class actions facilitate, it is difficult for civil rights plaintiffs to prove a pervasive pattern and practice of discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) ("In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971))). Establishing such a pattern often contributes to a just outcome because, as this Court has

held, it creates a rebuttable presumption of intentional disparate treatment and thus imposes upon the defendant the burden to establish that this was not the case. *Id.* at 361-62; *see also Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984); *Franks*, 424 U.S. at 772-73; *Employees Committed for Justice v. Eastman Kodak Co.*, 407 F. Supp. 2d 423, 428 (W.D.N.Y. 2005) ("Class actions are uniquely suitable for litigating discrimination claims under the pattern and practice framework.").[9] Statistical evidence of broad-based practices also facilitates proof of disparate impact discrimination, especially under Title VII and in other contexts where such proof can establish a prima facie case and thus shift the burden to the defendant to provide a business justification for its practice. *See, e.g.*, *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2197-98 (2010).

Furthermore, a class action is frequently the most effective means of procuring the broad relief necessary to eradicate entrenched discrimination. District courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co.*, 422 U.S. at 418 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). But this Court has held that "the scope of injunctive relief is

[9] Although this Court has never addressed whether *Teamsters*' burden-shifting method of proof is available in private non-class actions, several courts have held that it is not. *See, e.g.*, *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 967-69 (11th Cir. 2008); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 (5th Cir. 2001).

dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Thus, absent class certification, courts often refrain from granting relief that extends beyond what is necessary to remedy the harms suffered by the individual plaintiffs. *See, e.g., Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefiting an entire class in an *individual* suit, such broad relief is rarely justified. . . ."); *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) ("Ordinarily, classwide relief . . . is appropriate only where there is a properly certified class.").

To be sure, courts must conduct a "rigorous analysis" prior to certifying a class action. *Falcon*, 457 U.S. at 161. But where this hurdle is surmounted, "[t]he impact of class suits in civil rights cases is substantial. Precedent alone never has the effect of a judgment naming a particular class of which a person is a member. Very often, a class action permits the judge to get to the heart of an institutional problem." Hon. Jack Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973).

C. Civil rights class actions are a necessary supplement to public enforcement.

The California Supreme Court and other courts that have invalidated class-action bans in certain circumstances have rejected the notion that federal and state regulators have the capacity to provide an "adequate substitute" for the deterrent effect of private class actions. *Discover Bank v. Superior Ct.*,

113 P.3d 1100, 1110 (Cal. 2005); *see Gentry*, 165 P.3d at 567, 569. There is no evidentiary basis for the assertions of AT&T Mobility and its amici to the contrary. *Cf.* Pet'r. Br. 45; Br. of Amici South Carolina & Utah 4-6; Br. of Amici Law Professors 30-31; Br. of Amici Am. Bankers Ass'n. et al. 21-29; Br. of Amicus Chamber of Commerce 5-7. As this Court has recognized, "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government." *Deposit Guar. Nat'l Bank*, 445 U.S. at 339. While amicus LDF has long advocated for robust government enforcement of civil rights laws, federal and state regulators have faced historic and persistent constraints.

For example, the Equal Employment Opportunity Commission (EEOC) has consistently suffered from a shortfall of staffing and resources, resulting in ongoing backlogs in processing employment discrimination charges filed with the agency. *See* EEOC, *FY 2009 Performance and Accountability Report* 20-21 (2009); Steve Vogel, *EEOC Confronts Growing Backlog, Dwindling Staff*, Wash. Post, Feb. 3, 2009, at A13. Consequently, the EEOC has never been able to file suit in more than a "small fraction" of the charges that it receives annually. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002) ("recognizing that the EEOC files suit in less than one percent of the charges filed each year"). The Department of Justice (DOJ) litigates an even smaller number of employment discrimination cases. *See* U.S. Gen. Accounting Office, No. GAO-10-75, *U.S. Department of Justice: Information on Employment Litigation, Housing and Civil Enforcement, Voting,*

and Special Litigation Sections' Enforcement Efforts from Fiscal Years 2001 through 2007, at 30-37 (2009) (hereinafter "U.S. Gen. Accounting Office, *U.S. DOJ*").

State and local fair employment agencies are similarly short-handed. *See* Br. of Amicus Int'l Ass'n of Official Human Rights Agencies Supporting Petitioners 15-16 & app. B, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) (No. 08-974). Due to these constraints, "private lawsuits by aggrieved employees" have always been and will surely remain "an important part of [Title VII's] means of enforcement." *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 595 (1981).

Private attorneys general also provide a necessary supplement to public enforcement of fair housing laws. The FHA was originally designed to be enforced primarily by private plaintiffs. *See* 42 U.S.C. § 3601 *et seq.*; *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). Federal enforcement powers were subsequently expanded, *see* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ 810, 812, 814, 102 Stat. 1619, 1625-35 (codified at 42 U.S.C. §§ 3610, 3612, 3614), but agency action remains limited. For instance, the U.S. Department of Housing and Urban Development (HUD), which processes administrative fair housing complaints and adjudicates claims, has a history of backlogs and understaffing. *See* Nat'l Comm'n on Fair Housing & Equal Opportunity, *The Future of Fair Housing* 17 (2008); Nat'l Fair Housing Alliance, *A Step in the Right Direction: 2010 Fair Housing Trends Report* 26-27 (2010) (hereinafter "NFHA, *Step in the Right Direction*"). Moreover, DOJ's fair housing docket is

quite small, especially compared to the total number of fair housing complaints filed. *See id.*, at 20 & tbl.; U.S. Gen. Accounting Office, *U.S. DOJ*, at 49-54. State and local fair housing agencies face similar constraints. *See generally* U.S. Gen. Accounting Office, No. GAO-06-79, *Fair Housing: HUD Needs Better Assurance That Intake and Investigation Processes Are Consistently Thorough* (2006); U.S. Gen. Accounting Office, No. GAO-04-463, *Fair Housing: Opportunities to Improve HUD's Oversight and Management of the Enforcement Process* (2004).

Fair lending violations also have been underpoliced, despite strong evidence of ongoing discrimination in access to credit, especially in recent years. *See* Part I.B *supra*; U.S. Gen. Accounting Office, No. GAO-09-704, *Fair Lending: Data Limitations and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts* (2009); Binyamin Appelbaum, *Fed Held Back as Evidence Mounted on Subprime Loan Abuses*, Wash. Post, Sept. 27, 2009, at A01. From 2001 to 2009, federal banking regulators referred only 41 cases alleging a pattern and practice of race or national origin discrimination in lending to DOJ, and none of the referrals was from the Office of the Comptroller of the Currency (OCC), which supervises national banks. *See* NFHA, *Step in the Right Direction*, at 14-15.

Some state and local authorities have attempted to redress lending discrimination, but they have been stymied by federal agencies' preemption claims. *See* U.S. Gen. Accounting Office, No. GAO-04-280, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending*

58-71 (2004) (describing state predatory lending laws and federal preemption claims). While this Court recently rejected the OCC's expansive assertion that federal law authorized it to preempt state prosecutions of national banks for violations of state fair lending laws, the decision did not overturn federal regulators' restrictions on state efforts to obtain information about potential civil rights violations in the absence of a lawsuit. *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2721-22 (2009).[10]

Beyond filling the sizeable gaps in government enforcement, class proceedings focus attention on the scope and magnitude of discriminatory practices and create pressure for government regulators and legislators to address issues they might otherwise ignore. *See* Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev. 375, 426 (2010); Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. Cin. L. Rev. 1, 11-12, 46-48, 50-51, 73 (2009). In addition, judicial or voluntary resolution of class actions allows experimentation with potential remedies, which, if successful, may stimulate regulatory reform. *Id.* at 12, 53-54. For instance, the recent class actions targeting discrimination in vehicle financing, discussed in Part I.B *supra*, prompted legislative reform at the state level, including caps on dealer mark-up rates. *See, e.g.*,

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[10] Congress subsequently clarified relevant preemption standards, but the new law does not preclude all federal preemption claims. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1041-1048, 124 Stat. 1376, 2011-18 (2010).

2005 Cal. Stat. ch. 128, § 5 (Assem. B. 68) (codified at Cal. Civ. Code § 2982.10(a)) (enacting Car Buyer's Bill of Rights); 2004 La. Acts 276 (H.B. 1253) (codified at La. Rev. Stat. 32:1261(2)(k)).

Even where government agencies do pursue enforcement action, they often file suit only after private class actions are underway. *See, e.g.*, *Tucker v. Walgreen Co.*, Nos. 3:05-cv-440, 3:07-cv-172, 2007 WL 2915578, at *1 (S.D. Ill. Oct. 5, 2007) (noting that the EEOC filed suit almost two years after a private class action commenced). In such circumstances, private class actions play a complementary role; for instance, they provide an avenue for continued participation in the proceedings by individuals who were subjected to the defendant's discriminatory practices, and they may press for comprehensive relief more tenaciously than government regulators. *See, e.g.*, *United States v. U.S. Steel Corp.*, 520 F.2d 1043, 1047-48, 1060 (5th Cir. 1975) (vacating and remanding for the district court to further consider the scope of relief necessary to remedy discrimination against a class of 3,000 African-American steel workers who continued to pursue the appeal even after the federal government withdrew in favor of a negotiated settlement).

III. Federal law does not preempt courts from invalidating class-action bans under generally applicable state law.

Because of the significant deterrent effect of class actions in civil rights and other contexts, it is entirely appropriate that class-action bans have been held unenforceable in certain circumstances under the generally applicable contract law of California

and nineteen other states. Resp. Br. 17-21 & app. AT&T Mobility and its amici are incorrect that the FAA requires state courts to suspend their usual analysis as to whether a class-action ban is invalid, simply because that ban is inserted into an arbitration agreement. *Cf.* Pet'r. Br. 48-56; Br. of Amicus Chamber of Commerce 20-28. The FAA takes no position on class actions, and it specifically authorizes courts to review the validity of an arbitration agreement just as they would any other contract, which is exactly what the Ninth Circuit did when it applied California law in this case. Pet. App. 4a-11a; 9 U.S.C. § 2.

But AT&T Mobility and its amici also overlook a more fundamental reality: Federal law is far from hostile to class actions. This is especially true in the civil rights context. An animating principle behind the 1966 amendments to Federal Rule of Civil Procedure 23 was to facilitate use of class actions to effectively address civil rights violations. And Congress has often acted to ensure the availability of class actions for vigorous civil rights enforcement. These federal statutes and rules further support the conclusion that the FAA does not preempt judicial determinations that class-action bans are unconscionable in particular circumstances under generally applicable state law.

A. Federal law recognizes the importance of class actions especially for civil rights.

1. Civil rights litigators utilized class actions to combat discrimination in *Brown* and other cases prior to the 1966 amendments to Federal Rule of Civil Procedure 23. But those revisions galvanized

widespread acceptance of class actions as indispensable to vigorous civil rights enforcement. The 1966 amendments added Rule 23(b)(2), which provides for class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The Advisory Committee's Note affirms that civil rights class actions are paradigmatic cases for Rule 23(b)(2) certification.[11] Advisory Committee's Note, 39 F.R.D. at 102 ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class. . . ."). Courts and commentators, including drafters of the 1966 amendments, have acknowledged that Rule 23(b)(2) is especially suitable for class certification in civil rights cases. *See, e.g., Amchem*, 521 U.S. at 614 (recognizing that civil rights cases alleging class-based discrimination are "prime examples" of appropriate Rule 23(b)(2) cases); Deborah R. Hensler et

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[11] The Advisory Committee's Note cited eight race discrimination lawsuits as illustrative of cases intended to be certified under Rule 23(b)(2), each of which was litigated by amicus LDF. *See* Advisory Committee's Note, 39 F.R.D. at 102 (citing *Potts*, 313 F.2d at 286, *Bailey v. Patterson*, 323 F.2d 201, 202 (5th Cir. 1963); *Brunson v. Bd. of Trs. of Sch. Dist. No. 1*, 311 F.2d 107, 107 (4th Cir. 1962); *Green v. Sch. Bd.*, 304 F.2d 118, 119 (4th Cir. 1962); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156, 157 (5th Cir. 1957); *Mannings v. Bd. of Pub. Instruction*, 277 F.2d 370, 371 (5th Cir. 1960); *Northcross v. Bd. of Educ.*, 302 F.2d 818, 818 (6th Cir. 1962); *Frasier v. Bd. of Trs. of Univ. of N.C.*, 134 F. Supp. 589 (M.D.N.C. 1955) (three-judge court), *aff'd sub nom. Bd. of Trs. of Univ. of N.C. v. Frasier*, 350 U.S. 979, 979 (1956)).

al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 12 (2000) ("[T]he energizing force which motivated the whole rule . . . was the firm determination to create a class action system which could deal with civil rights." (quoting John Frank, Advisory Committee member; citation omitted)); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (Part I)*, 81 Harv. L. Rev. 356, 389 (1967) (explaining that "new subdivision (b)(2) . . . build[s] on experience mainly, but not exclusively, in the civil rights field").

2. In addition to the endorsement of civil rights class actions in the 1966 amendments to Rule 23, Congress has repeatedly recognized the importance of civil rights class actions.

For instance, when Congress amended Title VII in 1972, it expressly affirmed that class actions should be widely available to challenge employment discrimination. As the legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e *et seq.*) reveals, Congress rebuffed an amendment to Title VII that would have restricted private class suits. *See* 118 Cong. Rec. 7168 (1972) (statement of Sen. Williams) ("A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee."). Rather, Congress "agree[d] with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII." S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public

Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 436 (1972); *see also* Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 Colum. Hum. Rts. L. Rev. 1, 5 (1987) (describing the legislative history of the rejected provision).

When Congress again strengthened Title VII's protections in the Civil Rights Act of 1991, it rejected concerns about the scope of relief that could result from applying to class actions a new provision allowing for compensatory and punitive damages. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a)(1), (b), 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a(a)(1), (b)); *cf.* H.R. Rep. No. 102-40(II) at 68 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 754 (dissenting views of Rep. Henry Hyde et al.).

Another example is the Equal Credit Opportunity Act (ECOA). *See* Pub. L. No. 93-495, Title V, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. § 1691 *et seq.*). When Congress amended ECOA in 1976 to include race, national origin, and religion among the prohibited categories of discrimination, it strengthened the Act's express class action enforcement provisions by increasing the ceiling for class-action damages. *See* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, §§ 2, 6, 90 Stat. 251, 253 (codified as amended at 15 U.S.C. §§ 1691, 1691e). Although Congress simultaneously augmented public enforcement resources, the Senate Report emphasized that "the chief enforcement tool . . . will continue to be private actions for actual and punitive damages" and stressed the importance of class treatment in such private actions. S. Rep. No.

94-589, at 13-14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 415-16.

The FAA should be read in light of Congress's subsequent enactment of civil rights laws, the 1966 amendments to the Federal Rules, and judicial decisions interpreting them, which specifically recognize the contribution of class actions to the ongoing work of ensuring equal opportunity. *See, e.g., E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (recognizing that "suits alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs").

B. The Federal Arbitration Act does not preclude state-law review of class-action bans in arbitration agreements.

As respondents explain in more detail, the FAA does not preclude a court's application of ordinary state contract law to invalidate a class-action ban, simply because that ban has been embedded in an arbitration agreement. Resp. Br. 12-17; *see also Scott*, 161 P.3d at 1008 ("Clauses that eliminate causes of action, eliminate categories of damages, or otherwise strip away a party's right to vindicate a wrong do not change their character merely because they are found within a clause labeled 'Arbitration.'"). It is important to emphasize that respondents do not claim, and the Ninth Circuit did not hold, that a judicial forum for class litigation must always be available. Rather, the sole question is whether a ban on class actions in all forums, including both courts and arbitration, can be unconscion-

able under state law in at least some circumstances?[12]

The text of the FAA contains no bar on using class-action procedures in an arbitration, much less in court. *See* 9 U.S.C. § 1 *et seq.*; *cf. Califano*, 442 U.S. at 699-701 (concluding that "a direct expression by Congress of its intent" is necessary to depart from ordinary procedural rules permitting class actions). To the contrary, the FAA permits state courts to decline to enforce class-action bans in arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Of course, state "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687. But this Court has recognized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." *Id.*; *accord Perry*, 482 U.S. at 492. In this case, the Ninth Circuit based its conclusion that the class action ban was invalid upon generally applicable California contract law that has been applied equally to arbitration and non-arbitration contracts. Pet. App. 11a; *Gentry*, 165

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[12] Here, invalidating AT&T Mobility's class-action ban may cause respondents' class action to proceed in court. Under the "How-up clause" of AT&T Mobility's standard-form agreement, if the class-action ban is "found to be unenforceable, then the entirety of this arbitration provision shall be null and void." Pet. App. 61a. As a general matter, however, the FAA does not preclude parties from agreeing to classwide arbitration. *See Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

P.3d at 560-70, Resp. Br. 21-24. The FAA therefore provides no grounds for reversal.

It is in no way a departure from generally applicable state contract law for courts in California and elsewhere to consider the "public interest" served by class actions "in deterring wrongdoing" when assessing the validity of class-action bans. *See, e.g.*, *Feeney*, 908 N.E.2d at 764; *Scott*, 161 P.3d at 1005. Class actions are not simply a means of providing individual compensation; rather, "deterrence of corporate wrongdoing is what we can and should expect from class actions." Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 106 (2006). Thus, as the California Supreme Court has recognized and notwithstanding AT&T Mobility's assertions to the contrary, "it makes little sense to focus only on whether the class representative himself or herself would be stymied in the pursuit of an individual arbitration remedy . . . rather than considering as well the difficulties for the class of [plaintiffs] affected by [the defendant]'s allegedly unlawful practices." *Gentry*, 165 P.3d at 568 n.7; *cf.* Pet'r. Br. 39-48. As explained in Part II *supra*, there is often no effective substitute for a civil rights class action, especially in remedying and ultimately deterring systemic discrimination.

Ultimately, it is AT&T Mobility and its amici, and not the courts of California and other states, who are "singling out" arbitration for the type of "suspect status" that this Court has rejected as inconsistent with Congress's intent underlying the FAA. *Doctor's Assocs.*, 517 U.S. at 687; *Perry*, 908

N.E.2d at 765. The emphasis that AT&T Mobility and its amici place on the purported flaws of class arbitration suggests that their true priority is not to promote arbitration but to eliminate the potential for class actions by their employees and consumers in any legal forum. *Cf.* Pet'r. Br. 53-56; Br. of Amici Am. Bankers' Ass'n. et al. 13-20. The harm that will result if this goal is achieved is not limited to consumer protection cases such as this one; preserving judicial review of class-action bans under ordinary state contract law is equally critical in the civil rights context.

CONCLUSION

For the foregoing reasons as well as those outlined by respondents, the decision below should be affirmed.

Respectfully submitted,

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October 6, 2010

AMICUS CURIAE BRIEF

No. 09-893

In the Supreme Court of the United States

AT&T MOBILITY LLC, PETITIONER

v.

VINCENT AND LIZA CONCEPCION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The National Academy of Arbitrators (NAA), a professional and honorary organization, was founded in 1947 "[t]o establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis, including those who as a part of their professional practice hold hearings and issue written decisions in other types of workplace disputes." NAA Constitution, Art. II, § 1; see http://naarb.org/const_bylaws.asp.[1] The Academy is dedicated to the practice and study of arbitration and to the integrity and reputation of the arbitration process as a fair and effective way to resolve union-management and employment disputes. The Academy does not represent or promote the particular interests of employers, labor organizations, or employees.

The Academy currently has approximately 650 members in the United States and Canada. Aside from a small number of members selected as recognized authorities in the field of labor-management relations, the Academy requires each applicant for membership to demonstrate "substantial and current experience as an impartial arbitrator of labor-management disputes, so as to reflect general acceptability by the parties." See http://naarb.org/member

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission.

_guidelines.asp. Academy members may not serve as advocates, or consultants, for labor or management, nor may they be members of firms that perform such work. NAA Bylaws, Art. VI, § 6; see http://naarb.org/const_bylaws.asp.

Although the labor arbitration that was the Academy's original focus involved grievance arbitration – resolving disputes arising from collective bargaining agreements – the Academy's educational activities have broadened to include employment arbitration more generally. The Academy was a prime mover in the 1995 multi-partite *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*. See http://naarb.org/protocol.asp. Some of the Academy's members now serve as arbitrators in employment cases. The Academy has appeared before this Court as amicus curiae in past arbitration cases, including *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986).

In May 2009, the Academy issued *Guidelines for Employment Arbitration*, http://naarb.org/due_process.asp The *Guidelines* note that cases arising under an employer-promulgated, pre-dispute arbitration plan "require particular vigilance on the part of arbitrators to ensure procedural fairness and to protect the integrity and reputation of workplace arbitration." As relevant here, the *Guidelines* are concerned with the risk that employers will promul-

gate pre-dispute arbitration plans that would misuse arbitration to obtain unfair advantage or, potentially, exculpation from small-claims liability. They suggest that an arbitrator, before taking a case, should ask whether the arbitrator

> can serve in light of . . [a]ny restrictions on class or group actions to the extent these might hinder particular grievants in pursuing their claims, especially where the monetary amount of each individual claim is relatively small, or hinder the vindication of the public purpose served by the particular claim.

This case concerns the attempted use of arbitration agreements to potentially exculpate the drafting party from small claims and hinder the vindication of what California has determined are important public purposes. Because those effects are inconsistent with the fairness, integrity, and reputation of arbitration, the Academy submits this brief in the hope that its perspective will be of assistance to the Court.

SUMMARY OF ARGUMENT

In this case, petitioner's contracts entirely eliminate the possibility that its customers can present claims on a class-wide basis. It accomplishes that end by first mandating that all disputes be resolved in arbitration, and then specifying that all arbitrations must be on a bilateral, claimant-versus-company basis. California law denies enforcement of contractual provisions that entirely eliminate class-based dispute resolution, where such provisions

would in effect eliminate all or most liability for claims that cannot feasibly be expected to be brought on a non-class basis. That rule is not preempted, because it is saved by the savings clause of Section 2 of the Federal Arbitration Act (FAA) and does not otherwise conflict with the purposes of the Act.

The savings clause of Section 2 imposes a rule of nondiscrimination, by preserving "grounds . . . for the revocation of *any* contract," 9 U.S.C. 2 (emphasis added). The California rule, which is an application of longstanding state-law principles of unconscionability and public policy, satisfies the nondiscrimination requirement. Under the California rule, *no* contract – regardless whether it channels its disputes to arbitration or litigation – may include the prohibited no-class-action provision.

The savings clause, however, has force beyond nondiscrimination, grounded on two competing principles. The first principle is that States do not have plenary authority to regulate arbitration procedures, even if they do so by using nondiscriminatory laws. If they did have such authority, they would be able to destroy arbitration by requiring arbitration agreements to provide for all the procedural niceties of litigation, including jury trials, plenary discovery, etc. The savings clause thus does not preserve even nondiscriminatory state laws that simply attempt to dictate arbitration procedure. The second principle is that the Federal Arbitration Act does not affect substantive liability, but instead merely permits parties to move disputes to a different, arbitral forum. If a party in petitioner's position could in effect exculpate itself by adopting arbitration procedures that made it infeasible to bring some category of

claims, the result would be a misuse of arbitration to eliminate substantive liability. To preserve substantive liabilities as the FAA intended, the savings clause preserves nondiscriminatory state laws that restrict exculpatory procedural clauses in all agreements.

The California rule applied in this case is based precisely on the need to restrict exculpatory clauses. As the California Supreme Court explained, because vindicating small claims can be infeasible on an individual basis, a contract of adhesion that eliminates all ability to resolve disputes on a class basis in effect exculpates the drafter from liability. The California rule preserves the ability of the State to regulate the conduct of actors in its marketplace through its liability rules. At the same time, the rule intrudes on arbitration procedure no more than necessary to accomplish that end. It does not require parties to include class-based or any other procedures in arbitration or litigation; it merely requires that, whatever methods of dispute resolution petitioner chooses must continue to allow for *some* means to vindicate the protected class-based claims.

Petitioner argues that its arbitration agreement gives it a strong incentive to pay consumers' claims even before they go to arbitration. But it remains true that many consumers may be victimized by a single practice of petitioner's, while the dollar value of their claims may be sufficiently small to make it impractical for the vast majority of them to invoke petitioner's dispute-resolution process on other than a class-wide basis. The result, if petitioner's anti-class clause were enforced, would be exculpatory,

because it would eliminate potential liability – and petitioner's incentive to comply with the law.

Petitioner argues that class-based arbitration cannot be a fair means of resolving disputes, and that firms faced with the California rule would simply cease using arbitration. Given the potentially exculpatory effect of banning class actions entirely, petitioner naturally has an interest in making that claim. But class-based arbitration in fact continues to offer many of the same potential advantages as individual arbitration, such as the ability to choose expert or specialized arbitrators whose availability can be ensured, and to simplify procedural and evidentiary rules. To be sure, just as drafters of contracts may decide that the trade-off of the procedural rigor and appellate review of litigation against the benefits of arbitration is not worthwhile for any given class of cases, some may decide that the trade-off is unfavorable for large, or all, class actions. Because the FAA's foundational principle is consent, its purposes are served so long as the parties' choice between litigation and arbitration is honored.

ARGUMENT

The California rule applied in this case is an even-handed, non-discriminatory rule that represents a narrowly tailored attempt by the State of California to regulate its contracts – and, in turn, its marketplace – so as to ensure that firms comply with the law and do not evade legal liabilities. As such, it is well within the scope of state regulatory authority over contracts (and markets) preserved under the Federal Arbitration Act.

I. SECTION 2 OF THE FAA SAVES NONDISCRIMINATORY STATE LAWS THAT ARE DESIGNED TO PRESERVE STATE SUBSTANTIVE NORMS AND STATES' ABILITY TO REGULATE CONDUCT

Section 2 of the FAA is its "primary substantive provision." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It provides that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

The first clause of Section 2 provides that an arbitration provision "shall be valid, irrevocable, and enforceable." By its terms, it would directly conflict with, and hence preempt, any law that renders invalid or unenforceable an arbitration agreement or its provisions. Thus, while there are many types of agreements and contractual provisions that are ordinarily unenforceable under the law of any State, see

pp. 18-21, *infra*, the first clause of Section 2, taken alone, would immunize arbitration agreements from all such limitations.

To avoid that result, Congress added a savings clause to Section 2. Under the savings clause, agreements to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Thus, notwithstanding the first clause of Section 2, arbitration agreements are unenforceable if they run afoul of "grounds" that are recognized under state law as sufficient to warrant the "revocation of any contract." "[A]ny contract" and "grounds" are the key words in the savings clause.

In light of the existence of the savings clause in Section 2, petitioner's repeated (Br. 16, 18, 23, 48, 49) appeal to the principle that the FAA was designed to enforce arbitration agreements "in accordance with their terms" is of no relevance. It is precisely the point of the savings clause to preserve some state laws that make arbitration agreements or their provisions *un*enforceable. None of this Court's cases can be read to suggest – and the very existence of the savings clause refutes – that terms of an arbitration agreement that are contrary to an applicable and non-preempted state law are somehow enforceable under the FAA. In a case like this one, where preemption of state law is the issue, petitioner's repetition of the "in accordance with their terms" language is of no help.

A. The Savings Clause Requires Arbitration Agreements To Be Treated The Same As Other Contracts

1. The phrase "any contract" provides a key criterion for distinguishing those state laws that are saved under Section 2 from those that are preempted. As this Court has explained, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). While a law applicable to "any contract" would thus be saved, a state "law that takes its meaning precisely from the fact that a contract to arbitrate is at issue" does not come within the savings clause and remains unenforceable under the first clause of Section 2. *Ibid.* The savings clause does not preserve judicial decisions that "construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements" or that "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Ibid.*

The net result of the term "any contract" in the savings clause is to establish an equal footing, or nondiscrimination, requirement. That was clear from a passage this Court has often quoted, which notes that the FAA's purpose was that arbitration agreements be "placed upon the same footing as other contracts." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); see, *e.g.*, *Rent-A Center, West., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Gilmer*, 500 U.S. at 24; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511

(1974). Indeed, perhaps the central purpose of the FAA was to counteract the "ouster" doctrine, under which courts "traditionally viewed arbitration clauses as unworthy attempts to 'oust' them of jurisdiction" and thus refused to enforce them. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009). The ouster doctrine discriminates against arbitration, because it applies a special rule of nonenforcement to arbitration agreements; a similar rule of nonenforcement is not applied to agreements under which disputes would be resolved in court.

2. Each of the cases in which the Court has addressed the scope of the Section 2 savings clause has turned on whether the state law in question was specifically applicable to – and discriminated against – arbitration. In *Perry*, a state law permitted judicial actions to collect wages "without regard to the existence of any private agreement to arbitrate." 482 U.S. at 484. It thereby treated arbitration agreements distinctly less favorably than agreements under which disputes would wind up in court. In *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court held preempted a state law requiring arbitration agreements to be printed in large type on the first page of a contract, thus clearly applying a special rule to arbitration agreements. See *id.* at 687 ("By enacting § 2, . . . Congress precluded States from singling out arbitration provisions for suspect status."). In *Southland Corp. v. Keating*, 465 U.S. 1, 5 (1984), a state court construed a state law to require "judicial" – *i.e.*, not arbitral – "consideration of claims" brought under a state franchise law. This Court held that such a law, which clearly disfavored arbitration agreements, was preempted and not saved

under Section 2. In each case, the state law did not put arbitration agreements on the "same footing" as other agreements, under which disputes would go to court. For that reason, the state law in each case was preempted.

B. While State Laws That Simply Attempt To Control Arbitration Procedures Are Preempted, The Savings Clause Preserves State Laws Aimed At Exculpatory Procedures

This Court has not previously had occasion to consider the scope of the term "grounds" in the savings clause, nor has it had the occasion to consider nondiscriminatory state laws that affect arbitration procedures. While an overly broad construction of "grounds" would give States the power to eliminate arbitration entirely by requiring arbitration to take on all the trappings of litigation, an overly narrow construction would enable parties to evade substantive liabilities by establishing exculpatory "arbitration" procedures that in effect gut substantive state liability rules. Accordingly, the "grounds" that are saved under Section 2 must be limited to avoid either of those results.

1. *The parties have substantial control over the procedures to be used in arbitration.* It is an important feature of arbitration that the parties may "specify by contract the rules" for resolving their disputes. *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989); see *Hall Street Assocs. LLC v. Mattel*, 552 U.S. 576, 586 (2008) ("[T]he FAA lets parties tailor some, even many features of arbitration by

contract."). One of the benefits that arbitration offers is that the parties may tailor various aspects of the arbitration procedure to the type of dispute involved.

As petitioner argues (Br. 29, 41, 47), if States had plenary authority to apply nondiscriminatory state laws to arbitration, they would be able to eliminate arbitration entirely. To take a few of petitioner's examples, state laws requiring that disputes arising under any contract be resolved through the use of jury trials, plenary litigation-like discovery, or the state rules of civil procedure would be nondiscriminatory; such laws would apply entirely equally to arbitration agreements and all other agreements. But such laws would nonetheless in effect give States the power to destroy arbitration, because they would permit only "arbitrations" that resemble civil trials in all but name and courthouse.

It is a longstanding principle that a savings clause should not be construed so that the statute of which it is a part "destroy[s] itself." *American Telephone and Telegraph v. Central Office Telephone*, 524 U.S. 214, 228 (1998); see *United States v. Locke*, 529 U.S. 89, 106-107 (2000); *Morales v. Trans World Airlines*, 504 U.S. 374, 384-385 (1992). Accordingly, the "grounds" that may come within the savings clause – or the savings clause as a whole – should be understood not to include those that simply represent a State's view that litigation-specific procedures are preferable for resolving disputes. See, *e.g.*, *Carter v. SSC Odin Operating Co., LLC*, 927 N.E.2d 1207, 1220 (Ill. 2010) ("[W]e simply do not believe that this is the kind of defense Congress had in mind when it provided for a defense to preemption based on 'grounds as exist at law or in equity for the revocation

of any contract.'"). Even if it does not discriminate against arbitration – and therefore applies to "any contract" under the savings clause – a state rule requiring such procedures would not be a "ground" saved under Section 2.

2. *State law may affect arbitration procedures to ensure the enforcement of substantive liabilities and thereby regulate the State's marketplace.* The "grounds" that are saved under Section 2 must, however, include at least some state laws that have some effect on arbitration procedure. While a rule entirely preempting state laws that affect procedure would eliminate the threat that States could gut arbitration entirely, it would create the distinct, and at least equally troubling, specter that parties – especially drafters of adhesive contracts with control over their provisions – could use the FAA to contract their way out of substantive liabilities of all kinds.

This Court has long recognized that the FAA was not intended to affect laws imposing liability on parties for their conduct and thereby regulating the operation of its marketplace. After all, "[b]y agreeing to arbitrate . . . , a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1469 (2009); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer*, 500 U.S. at 26. If an arbitration agreement "only determines the choice of forum," *EEOC v. Waffle House*, 534 U.S. 279, 295 n. 10 (2002), then it necessarily leaves substantive state laws unaffected.

If substantive state law is to remain unaffected by the FAA, then States must have some ability to forbid "exculpatory" procedures – *i.e.*, those that would in terms or in effect eliminate substantive liability. The Court has made that point clear in the context of federal law, where it has explained that the FAA does not require enforcement of provisions in arbitration agreements that, while purporting to govern procedural matters, in fact have the effect of eliminating substantive liability. See *Mitsubishi*, 473 U.S. at 637 (FAA serves its function "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"); see also *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-541 (1995); *Gilmer*, 500 U.S. at 31 (arbitration procedure must give parties "fair opportunity to present their claims"). Because the FAA was not intended to affect either federal or state substantive liabilities, the same need to preserve substantive liability – and to ensure that the procedures will make the State's liability rules effective – applies to state laws.

Indeed, even petitioner grudgingly concedes that a State could consistently with the FAA exercise *some* control over arbitration procedures, noting in a footnote that States could impose "a requirement that the parties' chosen procedures ensure that claims feasibly can be vindicated." Pet. Br. 49 n.16. Petitioner cannot have it both ways, and its concession is fatal to its adjacent claim that the FAA precludes state law from having *any* affect on procedures in arbitration.

See, *e.g.*, Pet. Br. 49.[2] Both parties in this case thus agree that state law may have *some* effect on procedures in arbitration. It is our submission, with which at least petitioner's footnote appears to agree, that the line should be drawn at protecting substantive liability and the State's ability to regulate primary conduct.

3. *The savings clause protects state laws that are aimed at exculpatory provisions that systematically reduce liability, in terms or in effect.* In sum, the "grounds" that are preserved under the savings clause of Section 2 include nondiscriminatory state laws that are aimed at protecting the State's ability to control primary conduct and impose liability, even if such laws limit the parties' choices of procedures to be used in arbitration. Such state laws are aimed at exculpatory provisions that systematically reduce liability, in terms or effect, without regard to the merits of a claim.

Of course, many procedural mechanisms could easily have an effect on the result in any given case. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (plurality opinion)

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[2] To be precise, petitioner asserts that "conditioning enforcement of an arbitration provision on inclusion of a term adopting a particular procedure is 'fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.'" Pet. Br. 49 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1775). As noted below, the rule applied in this case in no sense conditions the enforceability of arbitration on the "inclusion of a term adopting a particular procedure." Petitioner may include in its contracts whatever provision regarding class arbitration it wants, so long as it permits *some* outlet – either court or arbitration – for the protected class actions. See pp. 26-27, *infra*.

(noting that "most procedural rules do" "affect[] a litigant's substantive rights").[3] The choice of such mechanisms is generally left to the contracting parties, not state law, under the FAA. It is only when the procedure becomes systematically exculpatory that it exceeds the authority of the parties under the FAA.

Petitioner's example (Pet. Br. 29, 41) of a state law requiring jury trials in arbitration provides a useful illustration. As exemplified by the Sixth and Seventh Amendments, American law generally recognizes the importance of the right of jury trial. But it also recognizes that reasonably fair decisions can be made by other kinds of impartial factfinders, who are equally required to decide liability in accordance with the facts and the law. See *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) ("For every argument why juries are more accurate factfinders, there is another why

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[3] In *Shady Grove*, the Court held that Federal Rule of Civil Procedure 23, not a conflicting state law, governs class action practice in federal court in diversity cases. The plurality reasoned that, because a Federal Rule governed the issue, "it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." 130 S. Ct. at 1444. That is because the Federal Rules were intended generally to govern, even if their application affects the outcome of a case. See *Hanna v. Plumer*, 380 U.S. 460 (1965). The FAA, however was *not* intended to operate regardless of its effect on substantive state-law legal obligations. Accordingly, unlike in *Shady Grove*, the "substantive or procedural nature or purpose of the affected state law" *is* crucial in applying the Section 2 savings clause. Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). State laws prohibiting impermissibly exculpatory clauses by definition have a substantive bite, and they accordingly are enforceable under Section 2.

they are less accurate."). Thus, it could not be concluded that a procedure that entrusts factfinding to a single impartial arbitrator or arbitration panel, rather than to a jury, would *systematically* work to exculpate wrongdoers.

The same is true for the other procedural mechanisms to which petitioner refers: plenary discovery, publication of decisions, and motion practice. See Pet. Br. 29, 41, 47. States could perhaps determine that procedures with *no* discovery, *no* opportunity to learn the basis of the arbitrator's decision, or *no* opportunity to bring an issue before the arbitrator are actually lightly disguised exculpatory provisions, designed to make it impossible that claims "feasibly can be vindicated." Pet. Br. 49 n.16. They could also likely determine that requiring an impossibly high filing fee would be similarly exculpatory. States could perhaps thus refuse to enforce arbitration agreements containing such provisions. But States could not generally require arbitrations to be free of *any* fee, or to include plenary discovery, publication of decisions, and litigation-style motion practice. Because arbitration procedures that do not systematically favor one side or the other can be had with or without those mechanisms, their choice must be left to the parties under the FAA.

II. THE *DISCOVER BANK* RULE IS NONDISCRIMINATORY

As explained above, a state law comes within the savings clause only if it does not discriminate against arbitration agreements – *i.e.*, only if it applies uniformly to arbitration agreements as to other contracts

under which disputes are to be settled by litigation. The rule applied in this case satisfies that standard.

A. The Unconscionability And Public Policy Doctrines In Contract Law Are Nondiscriminatory Rules

1. This Court has frequently explained that unconscionability, as well as related contract defenses such as fraud and duress, are the types of rules of contract law that, so long as they do not specifically discriminate against arbitration agreements, may be applied to render arbitration agreements or provisions in such agreements invalid. See *Casarotto*, 517 U.S. at 687 ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."); *Rent-a-Center West*, 130 S. Ct. at 2776 (same); *Mitsubishi*, 473 U.S. at 627 ("Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"); see *Southland*, 465 U.S. at 16 n.11 (1984) ("We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement.").

2. While the Court has not had occasion to address it in connection with the FAA, the public policy rule too is a rule of contract law applicable to "any contract," and it accordingly may be preserved by the Section 2 savings clause. Under the public policy rule, contracts or contract provisions against public policy are unenforceable. That rule has long been a

central feature of contract law in most (or all) jurisdictions. See *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); see also *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61-62 (2000); Restatement (Second) of Contracts § 178 (1981). Under that rule, for example, contracts for the doing of an act that would be illegal or tortious under state law, see 8 Richard A. Lord, Williston on Contracts § 19:9 at 178, § 19:23 at 291 (4th ed. 1998), or charging interest that would be usurious under state law, see 9 Williston on Contracts, *supra*, § 20:54, at 154, have frequently been held to be unenforceable as against public policy.

Similarly, the public policy doctrine has always had a particular concern with certain exculpatory contracts, such as those that "unreasonably exempt . . . a party from the legal consequences of a misrepresentation," Restatement, *supra*, § 196, or those that release a party from the consequences of its own negligence, see, *e.g.*, *Vodopest v. MacGregor*, 913 P.2d 779 (Wash. 1996). This Court has recognized a similar rule against exculpatory clauses in federal maritime law. See *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90-91 (1955) (noting "general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships," in order "to discourage negligence" and "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains"); *The Kensington*, 183 U.S. 263, 168 (1902) ("It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and . . . are in conflict

with public policy" and citing cases for that "frequently reiterated" rule).

3. Petitioner asserts that it is "dubious" that "public policy" rules are saved by Section 2, Pet. Br. 20, because "[p]ublic policy rules targeting specific types of contract provisions do not apply to 'any contract,' as Section 2 requires." Pet. Br. 40. Petitioner's doubt, however, is not supportable. This Court rejected it in *Mitsubishi*. See 473 U.S. at 637 n.19 (noting that if the arbitration provisions of a contract "operated . . . as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *Vimar Seguros*, 515 U.S. at 540-541 (same). Moreover, if contracts involving usurious interest or the commission of torts – or exculpatory clauses like those at issue in *Bisso* and *The Kensington* – are not generally enforceable in the courts of a State, it is not plausible that a drafter of a contract could reverse that result simply by providing for enforcement in a contract provision generally mandating arbitration. Section 2 was designed to put arbitration agreements on the "same footing" as other contracts, not to give parties a means to immunize themselves from ordinary contract (or other) law, including nondiscriminatory rules that declare certain contractual provisions against public policy.

More generally, it is impossible to make sense of petitioner's notion of "any contract," because many contract doctrines apply in petitioner's sense only to particular types of contracts. For example, many jurisdictions recognize that "contracts for liquidated damages, when reasonable in their character . . . may

be enforced between the parties," while "agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced." *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) (internal quotation marks omitted); see 24 Williston on Contracts, *supra*, § 65:1 at 215-225. Of course, not every contract includes a liquidated damages provision. But the liquidated damages rule, like many other similar rules, governs "any contract" and therefore comes within FAA Section 2, because it informs all contracting parties that, *if* they want to include an enforceable provision of a certain type in their contract, it must not violate the rule. A firm could not avoid the liquidated damages rule by providing that a liquidated damages provision would be enforceable in an arbitration regardless of whether it imposes a penalty.

B. Applying Those Doctrines, The *Discover Bank* Rule Treats Arbitration Agreements Just As Other Agreements

In this case, the court of appeals applied the California law of unconscionability and public policy, as set forth in *Discover Bank v. Superior Ct.*, 113 P.3d 1110 (Cal. 2005). The *Discover Bank* rule, as announced or as applied in this case, does not discriminate against arbitration.

1. *The* Discover Bank *rule.* Under California law, courts "may refuse to enforce" any contract found "to have been unconscionable at the time it was made," or may sever or "limit the application of any unconscionable clause" in order "to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a). A finding of

unconscionability under that statute requires both "procedural" and "substantive" components.

"Procedural" unconscionability "generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Discover Bank*, 113 P.3d at 1108 (internal punctuation omitted). "Substantive" unconscionability "may take various forms, but may generally be described as unfairly one-sided." *Ibid.* Not surprisingly, among such one-sided contracts are those that "operate effectively as exculpatory contract clauses that are contrary to public policy" under Section 1668 of the California Civil Code. *Ibid.* Section 1668 provides:

> Certain contracts unlawful. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law..

Discover Bank involved a class ban in a consumer credit card agreement that included a mandatory arbitration provision. The California Supreme Court held that at least "an element of procedural unconscionability [was] present" because the credit card agreement was a contract of adhesion, though that alone would be insufficient to render it unenforceable. 113 P.3d at 1108. The court also concluded that such class-action bans may be substantively unconscionable under Section 1668 because they are impermissibly exculpatory. *Ibid.* The court explained that, where a business cheats numerous

consumers out of small amounts of money, "the class action is often the only effective way to halt and redress such exploitation," 113 P. 3d at 1105, because "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," *ibid.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)). Because class actions are thus "inextricably linked to the vindication of substantive rights," 113 P.3d at 1109, a contract clause that precludes class actions may operate to exculpate the drafter from liability for small frauds or other illegal conduct. If so, it is contrary to public policy under Section 1668 and substantively unconscionable (and unenforceable) under California law.

The *Discover Bank* rule is designed not only to ensure that those who violate their contractual commitments pay damages and those who suffer loss are compensated. It is also designed as an important mechanism to police the State's commercial marketplace. As *Discover Bank* explained, the rule provides "aid to legitimate business enterprises by curtailing illegitimate competition." 113 P.3d at 1105. Without the risk of liability for overcharging its customers or otherwise failing to live up to its promises, a wrongdoing firm would actually have a competitive advantage in the marketplace, putting legitimate competitors at risk.[4] At bottom, the rule is thus designed

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[4] That is the same theory that underlies the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* See, *e.g.*, *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 36-37 (1987) (noting that FLSA "reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions"); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (nonenforcement would "exert a general downward pressure on

substantively to regulate the State's commercial marketplace.

The California Supreme Court made clear that it "d[id] not hold that all class action waivers are necessarily unconscionable." 113 P.3d at 1110. "But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages," *ibid.* and when the case involves "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," *ibid.*, the waiver is "in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another,'" *ibid.* (quoting Cal. Civ. Code § 1168), and unconscionable under California law.

2. *The* Discover Bank *Rule is non-discriminatory and operates independently of arbitration.* The rule of *Discover Bank* is nondiscriminatory and applies to "any contract" under the savings clause of FAA Section 2. As *Discover Bank* explained, "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally." 113 P.3d at 1112. That principle "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." *Ibid.*; see Pet. App. 12a-13a, 14a (same); *America Online v. Superior Court*, 108 Cal. Rptr. 2d

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wages in competing businesses"); *Overnight Motor Transport Co. v. Missel*, 316 U.S. 572, 576-577 (1942).

699 (Cal. Ct. App. 2001) (class waiver invalid in nonarbitration agreement); see also *In re Yahoo! Litigation*, 251 F.R.D. 459 (C.D. Cal. 2008) (applying *Discover Bank* test to non-arbitration agreement).

Petitioner argues (Br. 32) that the *Discover Bank* rule "deviates in at least four significant ways from the traditional unconscionability principles applied by California courts outside the arbitration context." But petitioner advances no support whatever for the proposition that California courts would treat bans on class-based arbitration in any way differently from bans on class actions "outside the arbitration context," *i.e.*, ordinary contracts under which disputes would be resolved in litigation. Respondents explain that the *Discover Bank* rule is simply an application of the settled law of unconscionability and public policy in California. See Resp. Br. 38-47. But even if *Discover Bank* had marked more of a break with past state law, that would not affect the Section 2 analysis. So long as the *Discover Bank* rule puts all contracts – *i.e.*, those under which disputes will be settled in arbitration and those under which disputes will be settled in court – on the same footing, it applies to "any contract" under the Section 2 savings clause.

3. *The* Discover Bank *Rule is based on the State's need to protect its substantive liability rules.* The sole rationale of the *Discover Bank* rule is to keep companies drafting adhesive contracts from in effect exculpating themselves from small-claims liability by using arbitration clauses to eliminate class-based procedures entirely. See 113 P.3d at 1110. The rule is not designed merely to regulate procedure in arbitration cases or to impose litigation-like procedures

on arbitration, on the ground that the State believes that such procedures are a preferable means for resolving disputes. Instead, it is designed to protect the State's substantive liability rules and its ability to regulate conduct in its marketplace.

Petitioner argues extensively (Br. 4-8, 35-36) that the arbitration scheme it employs in its contracts is not exculpatory, because it offers incentives to consumers to bring claims. Most of the provisions cited by petitioner, however, merely ensure that the arbitration process will not be costly to consumers and will give a premium payment of up to $7,500 to a consumer who recovers more in arbitration than petitioner's last pre-arbitration "written settlement offer." Pet. Br. 6-7. The scheme thus may well give petitioner a substantial incentive to "simply pay the face value of the [$30.22 average] claim before the selection of an arbitrator to avoid paying $7,500" as a premium. Pet. App. 10a. But paying a handful of small claims would not deter petitioner from continuing to overcharge the vast balance of its customers. And petitioner's scheme does not affect the practical feasibility of bringing a claim – even to petitioner's internal pre-arbitration process – because it does not alter the fact that "the maximum gain to a customer . . . is still just $30.22." *Ibid* Accordingly, petitioner's arbitration scheme continues to operate as an exculpatory clause with respect to small consumer claims, since consumers still have little reason to expend the effort to bring such claims. It therefore comes well within the rationale of the *Discover Bank* rule to prohibit exculpatory contracts.

Moreover, although petitioner repeatedly characterizes the *Discover Bank* rule as a rule that

"dictate[s] the procedures that apply in arbitration," Pet. Br. 15; see Pet. Br. 21-22, 49-52, in fact the rule plainly does not do so. Consistently with *Discover Bank*, drafting parties may continue to provide for arbitration of whatever categories of disputes – bilateral or multilateral – they want. What a drafting party may not do, at least in an adhesive contract, is to use the FAA to eliminate class-based dispute resolution entirely if such elimination would have the effect of exculpating itself from substantive legal obligations under state law.

Finally, the *Discover Bank* rule accomplishes the substantive end of California law to preclude exculpatory contracts without otherwise intruding on the ability of contracting parties to choose their own arbitration procedures. In *Discover Bank* itself, the court recognized that there may be cases in which parties negotiating a non-adhesive commercial contract could validly decide that they wanted to resolve disputes only by means of bilateral arbitration. See 113 P.3d at 1110 ("We do not hold that all class action waivers are necessarily unconscionable."). Moreover, California law would likely permit class waivers to be given effect in cases where the claims are large enough to remain individually viable. See *ibid.* (applying rule only where "disputes . . . predictably involve small amounts of damages"). As a general matter, the *Discover Bank* rule does not attempt to interfere with the choice of procedure in arbitration. It steps in only when the drafting party of a contract of adhesion requires procedures that would in effect exculpate it from liability and thus frustrate the State's determinations about the rules that should

govern the conduct of marketplace transactions in the State.

III. CLASS-BASED ARBITRATION OFFERS ADVANTAGES FOR RESOLVING AT LEAST SOME CLASS-BASED DISPUTES, AND THE *DISCOVER BANK* RULE IS NOT A BAN ON CONSUMER ARBITRATION AGREEMENTS

Petitioner asserts that "California's rule conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration is for all practical purposes a ban on consumer arbitration agreements," which "cannot be reconciled with the FAA's policy of promoting arbitration." Pet. 56. That assertion is mistaken. First, experience shows that class-based arbitration can be a fair and effective method of resolving class-based disputes. Second, California law does not "condition[] the enforceability of arbitration provisions on the availability of class-wide arbitration"; rather, it continues to permit businesses to tailor their arbitration agreements to include or exclude some or all class-based disputes – so long as they leave *some* forum open for class-based dispute resolution of small claims. That effect is entirely consonant with the FAA's purposes.

A. Class-based Arbitration Can Be A Fair And Effective Means Of Resolving Disputes

1. *The AAA Rules.* An important step in framing rules to address the issues that arise in class-based arbitration was the American Arbitration Associa-

tion's adoption of Supplementary Rules for Class Arbitrations (Supp. Rule) in October 2003. See http://www.adr.org/sp.asp?id=21936. As the Association informed this Court in its amicus brief in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), it concluded that, under these rules, fairness to absent parties and the evenhanded protection of both sides could be achieved, while preserving many of the normal efficiencies and conveniences of the arbitration process. AAA Br. at 12.

The Rules divide the resolution of class arbitration issues into three distinct phases, giving the parties the opportunity at stated intervals – the Clause Construction award, the Class Determination award, and the Final Award – to obtain a stay of proceedings and ask a court to confirm or vacate a decision by the arbitrator. Supp. Rule 3, 5, 7. In light of the interests of absent class members, the Rules provide that all hearings and awards will be public, "subject to the authority of the arbitrator to provide otherwise in special circumstances." Supp. Rule 9(a). Thus, in each AAA class arbitration, the AAA posts the demand for arbitration, the identities of the parties, the names and contact information of counsel, all awards rendered in the case, and the date, time and place of any scheduled hearings. See http://www.adr.org/sp.asp?id=25562 (AAA docket of class arbitrations).

As the AAA's *Stolt-Nielsen* brief explains (at 21), the AAA's Rules are a "useful quasi-hybrid model" that combines "arbitrator autonomy with a laudable opportunity for judicial oversight at phases 1 and 2 of the process." One author has noted that the Rules "create a useful record and procedural guideline" that facilitates judicial review, while "minimiz[ing] expen-

ditures of time, money, and effort," and limiting delays and obstructions in class arbitration proceedings. S.I. Strong, *Enforcing Class Arbitration In The International Sphere: Due Process And Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 41, 42 (2008).

In its *Stolt-Nielsen* brief (at 22-24), the AAA noted that, as of September 2009, it had administered 283 class arbitrations, of which 135 resulted in Clause Construction Awards and 48 in Class Determination Awards. While no cases had as of that date yet resulted in Final Awards, 162 of the cases had been settled, withdrawn, or dismissed, with a median time frame from filing to closure of 583 days and a mean of 630 days. While class arbitrations thus appear to take longer than simpler commercial arbitrations, even petitioner does not dispute that those time periods are likely substantially shorter than the average class action in court.

2. *Like individual arbitration, class-based arbitration continues to offer a package of benefits and costs.* Petitioner and its amici argue expansively that class-based arbitration is a "lose-lose proposition for businesses" that "no rational business will agree to." Pet. Br. 22; see Chamber of Commerce Br. 4-19. Given the potential to rid themselves of legal liability for small claims, it is understandable that petitioner and its amici would have a strong interest in eliminating class-based dispute resolution of all kinds. But the facts do not bear out petitioner's assertion.

a. Many of the complaints lodged by petitioner against class-based arbitrations are in fact complaints about *any* class-based resolution of disputes. The merits and utility of class-based resolution of

disputes has been the subject of an intense public debate, in which amicus itself takes no position. Responding to a perceived need for reform, Congress has enacted legislation. See, *e.g.*, Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005). Neither Congress nor California, however, has accepted petitioner's arguments that class actions should be eliminated entirely. Accordingly, insofar as is relevant to this case, this Court ought not to operate under petitioner's premise that class actions are inherently unjust. Instead, the Court should operate on the premise embodied in California (and federal) law: that class-based resolution of disputes can serve an important function in our system of justice in regulating conduct, adjudicating disputes, and remedying injuries. Petitioner's effort to have this Court stretch the FAA in order to achieve its goal of eliminating class actions should be rejected. The remedy, if any, for petitioner's complaints lies with Congress.

b. In any event, class-based arbitration can – and has – offered many of the benefits of arbitration, and, like arbitration generally, it can offer an appealing alternative to litigation. This Court has noted that arbitration generally can be cheaper and faster than litigation, and it can employ simpler procedural and evidentiary rules. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). There are, however, tradeoffs. Parties that opt for arbitration in any category of cases forgo "the procedural rigor and appellate review" of litigation. *Stolt-Nielsen*, 130 S. Ct. at 1775. The policy of the FAA is to permit parties to weigh the costs and benefits of arbitration in

any class of cases, and to honor their determination of which disputes to channel to which forum.

The same trade-offs apply to class arbitration. Class arbitration can proceed more quickly than class actions in court, because the parties can control the availability of the arbitrators' time and scheduling of the proceeding in a way that would be impossible in court. An important benefit of arbitration is that "[t]he anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Mitsubishi*, 473 U.S. at 633-634. As with other types of arbitration, class arbitration may employ simpler procedural and evidentiary rules than class actions in court. The result of all of those differences is that parties can provide for class arbitrations that are more flexible, cheaper, and faster than class action litigation in court.

To be sure, class-based arbitration, like class action litigation, can in a given case be more complex, more expensive, and more time-consuming than simpler bilateral proceedings. In *Stolt-Nielsen* this Court reasoned that the added potential complexity of class-action litigation, along with the potentially high stakes that can be involved, meant that arbitrators should not "presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." 130 S. Ct. at 1776. But it is not the case – and the Court did not suggest in *Stolt-Nielsen* – that properly structured class-based arbitration can offer no advantages over class-action litigation.

Indeed, this Court has already rejected an argument much like that advanced by petitioner. In *Mitsubishi*, it was argued that antitrust cases - like class-based claims in this case – are too complex to be heard by arbitrators. The Court did not reject the factual premise that antitrust cases may indeed be more complex than other types of cases. 473 U.S. at 633. But the Court also reasoned that arbitration of antitrust cases may offer advantages as compared with litigation of antitrust cases. It concluded that "the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter." *Id.* at 634. Nor can it be concluded that an arbitral tribunal could not properly handle a class-based arbitration.

B. Consistent With The FAA, The *Discover Bank* Rule Offers Firms The Choice Whether To Use Arbitration Or Litigation For Different Categories Of Cases

Petitioner argues that the *Discover Bank* rule "is for all practical purposes a ban on consumer arbitration in California." Pet. Br. 56. Petitioner contends that in response to the *Discover Bank* rule, "the nation's largest cable company, Comcast Corp., has already abandoned arbitration in California." Pet. Br. 55-56. Petitioner concludes (Br. 53) that permitting that result would conflict with the FAA's purpose "of remov[ing] impediments to arbitration."

That conclusion is mistaken. California law permits companies to exercise precisely the choice that petitioner did here: though they cannot entirely eliminate class-based claims, they can decide whether

such claims should be resolved in court or arbitration, just as they do with other types of claims. See Pet. App. 61a (opting for class litigation if class arbitration ban unenforceable). Arbitration retains certain advantages over litigation, and some firms would no doubt continue to require arbitration of at least some class-based claims under the *Discover Bank* rule. See, *e.g.*, *Fensterstock v. Education Finance Partners*, 611 F.3d 124, 140 (2d Cir. 2010) (firm prefers class arbitration to class action litigation); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir. 2007) (same); see also p. 30, *supra* (AAA had administered 283 class arbitrations as of September 2009).

But even if firms determined that all class-based claims should be resolved in court rather than arbitration, that would in no way contravene the purposes of the FAA. Entirely aside from class-based claims, a firm may decide that a given category of case may involve a particularly large sum of money or an unsettled legal issue of great importance, and that the benefits of litigation in such a case, including procedural rigor and full appellate review, outweigh the advantages of the arbitral forum. The firm may thus decide to require arbitration of garden-variety cases while requiring litigation of more troublesome categories. As this Court has noted, arbitration "is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); accord *Volt*, 489 U.S. at 478; *Mitsubishi*, 473 U.S. at 628. Nothing in the FAA was designed to ensure that firms would find it beneficial to channel all categories of cases to arbitration.

The *Discover Bank* rule leaves firms with the same choice. A firm may decide that its calculus of costs and benefits demands that class-based claims, or class-based claims of a certain size, should be heard in court. If so, the firm could, for example, provide that all class-based claims, or class-based claims with more than *x* claimants, may not be brought in arbitration. Meanwhile, the firm can provide for bilateral or smaller class-based disputes to benefit from the flexibility, speed, and lower costs of arbitration. Because "the foundational FAA principle" is "that arbitration is a matter of consent," *Stolt-Nielsen*, 130 S. Ct. at 1775, the FAA's purposes are served so long as the free choices of the parties to channel disputes to arbitration – or to litigation – are honored.

If a firm genuinely believed that bilateral arbitration had advantages over litigation but that class-based arbitration did not, the firm would have no reason to terminate its arbitration agreements entirely in response to *Discover Bank*. It could instead simply eliminate arbitration of some or all class-based disputes. If instead, as petitioner and its amici argue, affirming the decision below would "cause businesses to give up arbitration entirely" (Chamber of Commerce Br. 21), that would merely demonstrate that those businesses had no real interest in arbitration in the first place. The fact that some businesses favor arbitration only if it would eliminate class actions (and thus exculpate themselves from some degree of substantive legal liability) provides no reason for stretching the terms of the FAA to invalidate the *Discover Bank* rule.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL WORKRIGHTS INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Workrights Institute (NWI) is a nonprofit research and advocacy organization focused exclusively on issues of the workplace and employee rights. Before becoming an independent organization, the Institute was

[1] As reflected on the Court's docket, petitioner and respondents have kindly provided blanket consents to the filing of *amicus* briefs. In accordance with Rule 37.6, we declare that counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

the National Taskforce on Civil Liberties in the Workplace for the American Civil Liberties Union in 1988-1999.

The Institute has long been a leader in the development of employment disputes arbitration. It believes that arbitration holds the promise of making workplace justice widely available to unorganized workers for the first time in our country's history, and that the growth of employment arbitration should be encouraged. The NWI also believes that arbitration will only fulfill that promise if it complies with all the standards of due process. Institute president Lewis Maltby's 1994 article in the New York Law School Journal of Human Rights was the first major publication to advocate this position.[2]

Later Maltby served as an active member of the American Bar Association's National Taskforce on Employment Arbitration, which drafted the employment due process protocol that has become the national standard for arbitral fairness. He testified before the Dunlop Commission on the Future of Worker-Management Relations regarding alternative dispute resolution (ADR). Maltby has also been on the Board of Directors and the Executive Committee of the American Arbitration Association, and was co-chair of its advisory council on employment issues. More recently the NWI provided testimony before a Senate subcommittee on fairness in arbitration[3] and briefing for EEOC Commissioners and

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[2] Lewis Maltby, *Paradise Lost - How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. Sch J. Human Rts. 1 (1994).

[3] *Overview of Contractual Mandatory Binding Arbitration: Hearing before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong., 2d Sess. 77-80 (2000) (statement of Lewis L. Maltby, President, National Workrights Institute).

staff on employment arbitration. The Institute submitted written comments to the California Judicial Council in 2002 opposing proposed new rules on arbitrator disclosure, on the grounds they were unnecessary and virtually impossible to comply with.

In addition to its interest in arbitration, the National Workrights Institute has played a major role in seeking and securing many new federal and state laws promoting workplace human rights in such areas as genetic discrimination, video surveillance, drug testing, electronic monitoring, whistleblower protection, and off duty conduct.

SUMMARY OF ARGUMENT

The National Workrights Institute (NWI) would first like to emphasize that an organization which strongly favors the arbitration of employment disputes also firmly believes that the availability of class actions is indispensable for the vindication of certain workplace rights, especially for lower-income persons. Developments in arbitration law in the consumer and the employment contexts obviously affect each other.

Second, as our principal contribution, we wish to place before the Court our analysis of five specific cases that strikingly demonstrate the utter necessity of class actions for effective remediation in certain instances. These five cases all deal with employment claims. They show that restrictions on class actions that petitioner seeks in the present consumer case would also have the most detrimental consequences in enforcing rights in employment and elsewhere. The legal fees generated by the five cases analyzed would have been grossly inadequate to enable any of these important cases to be brought individually.

Finally, it is no solution for petitioner to offer what it suggests in effect is free arbitration for the complaining consumer. That greases the proverbial squeaky wheel – and leaves untouched the mass of consumers (or employees in other contexts) who suffer silently, unaware that there are remedies for their violated rights. Petitioner's approach ignores two of the prime benefits of a class action: first, to educate other members of the class about their rights and to enable their participation in rectifying the wrongs done them, and, second, to provide broad and truly effective relief, which will both remedy the existing misconduct and deter future violations.

ARGUMENT

I. FOR THE LEGAL FRAMEWORK OF THIS CASE, WE ADOPT THE POSITION SET FORTH IN THE BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS.

To avoid burdening the Court with unnecessary repetition, the National Workrights Institute (NWI) adopts the legal positions set forth in the brief *amicus curiae* of the National Academy of Arbitrators concerning preemption of state law by the Federal Arbitration Act, 9 U.S.C. §§ 1-16; the validity and enforcement of agreements to arbitrate; the status of class-action waivers; and other matters germane to this case.

While we support the position of respondents Vincent and Liza Concepcion here, we reiterate emphatically that the NWI does not oppose arbitration generally, and indeed considers employment arbitration most beneficial to the individual employee, especially the rank and file, lower-paid worker. As set forth in our Statement of

Interest, NWI's President Lewis Maltby helped draft the employment due process protocol, advised the Dunlop Commission about ADR, testified before a Senate subcommittee on fairness in arbitration, and briefed EEOC Commissioners and staff on employment arbitration. The NWI also submitted written comments to the California Judicial Council in 2002 opposing proposed new rules on arbitrator disclosure, on the grounds they were unnecessary and virtually impossible to comply with.

II. FIVE EXEMPLARY EMPLOYMENT CASES DEMONSTRATE THAT CLASS ACTIONS ARE NECESSARY FOR MANY EMPLOYEES, ESPECIALLY LOWER-PAID WORKERS WITH MODEST CLAIMS, TO VINDICATE THEIR RIGHTS.

The National Workrights Institute (NWI) examined five of the largest and most-publicized employment class actions of the last two decades and published the results in *Class Actions: A Look at the Record*.[4] The aim was to determine the legitimacy of the claims, the respective recoveries of employees and lawyers, and the need for class actions. We will concentrate here on the class-action issue. What this Court decides in the present consumer case will necessarily affect arbitration in employment and other contexts. Approval of petitioner AT&T Mobility's restrictions on class actions would have gravely adverse consequences for arbitration generally. The following are the facts of the five employment cases NWI reviewed.

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[4] National Workrights Institute, Class Actions: A Look at the Record (undated), *available at* http://www.workrights.org/issue_discharge/NWIClassAction.pdf (last visited September 6, 2010).

BOEING[5]

A group of 15,000 employees sued Boeing for discriminating against women and racial minorities in compensation. Boeing's own Diversity Salary Assessment team stated that "Asian and Black hires received, on average, lower starting salaries than Caucasians in the Northwest." A 1997 internal audit concluded: "Similarly situated women and minorities have lower starting salaries." It also found that "women and minorities are placed in lower grade levels and lower paying positions." In merit pay reviews, the audit reported: "African-Americans tend to receive lesser (percentage) increases in engineering." In January 1998 top Boeing executives attending a diversity session at the company's annual meeting were briefed on an internal survey of its affirmative action issues. "Racial bias" was reported in hiring and "gender and racial bias" in promotions.

Boeing settled the case for $15 million. Of this, $3.85 million was received by attorneys representing the employees. After all other expenses had been paid, the employees recovered $7.3 million, or just under half the total settlement. For the employees receiving compensation, the amounts ranged from $1,000 to $50,000.

MITSUBISHI[6]

Over 300 female employees filed a class action against Mitsubishi for sexual harassment. They alleged they had been groped, pressured for sex, and threatened by co-workers. Some women claimed they had to agree

[5] Williams v. Boeing Co., No. C98 761P (W.D. Wash.).

[6] EEOC v. Mitsubishi Motor Mfg. of America, Inc., No. 96-1192 (C.D. Ill.).

to sex to win jobs. Drawings of genitals, breasts, and various sexual acts, labeled with women's names, were placed on car fenders and run down the assembly line. The women had complained to management but received scant attention.

After the class suit was initiated, Mitsubishi apologized to the women and agreed to pay $34 million, the largest sexual harassment settlement in history. There were no legal fees because EEOC represented the women. The women got an average of $69,959.

IBP[7]

In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), over 5,000 employees claimed they were entitled to compensation under federal wage and hour laws for time spent walking to their work areas after donning protective gear. Unlike the other cases in this study, management did not settle. The case ultimately reached this Court, which unanimously ruled that the employees were entitled to compensation for this time.

The award was $11.4 million. The employees received $9.5 million and their attorneys the remaining $1.9 million. The awards to individual workers ranged from $20 to $15,000. The average award was $1,886.

There is an additional element of public interest in the collective enforcement of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, at issue in the *IBP* case. The Act's purpose is not only to compensate employees who have been underpaid and to deter future violations, but also to police the marketplace and prevent wrongdoers from securing a competitive advantage over firms complying

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[7] Alvarez v. IBP, Inc., No. CT 98-5005-RHW (E.D. Wash.).

with the wage and hour laws. As this Court stated in *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987), the FLSA "reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions."

THE GAP[8]

Over 30,000 workers employed by firms producing garments for The Gap, J. Crew, Tommy Hilfiger, and other prominent retail outlets were the subject of suits brought in 1999 over the conditions in the factories where they worked on the island of Saipan, a territory of the United States. It was claimed that the workers were:

> virtually imprisoned when not working in "dormitories" that were unfit for human habitation;
>
> forced to work up to 12 hours a day, 7 days a week, without being paid overtime;
>
> not paid at all for many of the hours they worked;
>
> forced to remain in Saipan against their wills; and
>
> required to pay illegitimate "debts" to their employers.

Many of these allegations were confirmed by reports from the U.S. Departments of Labor and of Interior. The employers' time records, obtained through discovery,

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[8] Union of Needletrades Industrial and Textile Employees (UNITE) v. The Gap, Inc., No. CV01-0031-1387 (Cal. Super. Ct., San Francisco). *See also* Does I v. The Gap, Inc., No. CV-01-0031 (D.N.M.I.); Does I v. Advanced Textile Corp., No. CV 99-0002 (D.N.M.I.).

showed widespread violation of wage and hour laws. Copies of the workers' contracts, also obtained through discovery, confirmed allegations about illegal control of workers' off-duty conduct.

The defendants ultimately resolved the case through a settlement agreement that provided $20 million to compensate the workers and to create a monitoring program to prevent future abuses.

COCA-COLA[9]

In 1998 over 2000 African-American employees of Coca-Cola filed a class action alleging they were paid less than comparable Caucasian employees. *Abdallah v. Coca Cola Co.*, 133 F. Supp. 2d 1364 (N.D. Ga. 2001). There were indications that African-Americans were paid 60 percent less on average than Caucasians. In addition, the evidence showed that Caucasians were twice as likely as African-Americans to reach the professional or managerial level, four times as likely to reach the director level, and ten times as likely to reach the vice-presidential level.

Coca-Cola settled the suit for $192 million. Plaintiffs' counsel received $20 million and the remaining $172 million went to the employees. The average recovery was $81,810.

For present purposes, the critical question is whether these employees could have secured appropriate remedies without the capacity to bring class actions. The National Workrights Institute (NWI) compared the amounts received and the legal fees they would have generated (on a standard contingent fee basis) if the

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[9] Abdallah v. Coca-Cola Co., No. 1-98-CV-3679 (RWS) (N.D. Ga.).

actions had been brought on an individual basis with the estimated legal fees these employees would actually have been required to pay to file an individual suit. To obtain the latter figure, NWI asked experienced employment lawyers to review each case and estimate the legal fees they would have charged to represent a single member of the class. Each attorney was also asked whether he or she would have been willing to represent the employee on a contingency fee basis. The following table shows the results of this analysis. The potential (contingent[10]) legal fees generated by the average recovery and by the highest recovery in each case are compared with what an experienced employer lawyer estimated would be the actual fee required to handle the case on an individual basis.

Individual Recoveries and Related Legal Fees (in Dollars)

Case	Average Recovery	Potential Legal Fees
Boeing	487	162
Coca-Cola	81,810	32,720
The Gap	193	77
IBP	1,886	753
Mitsubishi	69,959	27,984

[10] We have been conservative and have generally used the high contingent fee figure of 40%.

Case	Highest Recovery	Potential Legal Fees	Required Legal Fees
Boeing	50,000	20,000	125,000
Coca-Cola	N/A	N/A	120,000
The Gap	N/A	N/A	25,000[11]
IBP	15,000	6,000	30,000
Mitsubishi	N/A	N/A	162,000

The results are striking. In all five cases the legal fees required to bring an individual action far surpass the contingent fees the cases would have generated. Even the employees who obtained the largest amounts would have been unable to afford counsel. The highest recoveries were secured by the employees of Coca-Cola, who received $81,810 each. Even this amount, however, would not have been sufficient for the employees to retain counsel individually. This recovery would have generated legal fees of at most approximately $32,720 even under extremely generous assumptions.[12] This is barely one-quarter of the $120,000 in legal fees an experienced employment lawyer estimated would be required to handle the case. For the other employee-plaintiffs in the cases NWI examined, the discrepancy between the legal

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[11] This figure represents only the estimated legal fees for bringing an action against the factory owner solely on the basis of claims limited to the Fair Labor Standards Act. The legal fees for bringing the entire case on behalf of a single employee would have been substantially higher.

[12] This figure assumes a contingency fee of 40%, which is the maximum commonly charged. In many cases the fee is lower, frequently 33%. It also assumes that there are no expenses in the case, which are paid from the employee's share of the recovery. Under other assumptions, the fee generated would be even lower.

fees required to handle the case and the legal fees an individual case would generate are even greater. Not one of the over 50,000 employees in the cases NWI reviewed would have been able to pay for legal representation without the availability of class actions.

These five cases also illustrate dramatically several other sobering truths about the deficiencies of individual actions in pursuing employee rights. There is a forbiddingly heavy cost for the discovery and statistical analysis usually needed in proving pattern-and-practice discrimination in Boeing and Coca-Cola situations. Public exposure is a frequent obstacle in a sexual harassment case like Mitsubishi. Garment workers' justified fears of physical violence, debtors' prison, and other extreme forms of retaliation in the Gap case led the Court of Appeals to allow plaintiffs to proceed under "Jane Doe" pseudonyms in *Does I-XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000). Finally, as discussed more fully in the next section, company-wide injunctive relief or the equivalent sort of settlement obtained in some of these class actions may simply be unavailable in an individual suit or grievance.

A survey of plaintiffs' employment lawyers conducted in 1995 indicated that a worker had to have a minimum of $60,000 in economic damages (not counting pain and suffering or punitive damages) for a lawyer to take the case to court.[13] Even if the cost of litigation has increased only as much as inflation, the minimum required damages

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[13] William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50 Disp. Resol. J., Oct Dec. 1995, at 40, 44-45. See also Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J., May-July 2003, at 8, 10-11.

would now be about $84,000.[14] Yet the average economic loss for employees who lose their jobs is only about $14,000.[15] Viewed another way, plaintiffs' employment lawyers have reported that they agreed to represent only about one in 20 workers who sought counsel in an employment dispute.[16] However one looks at the figures, the inescapable conclusion is that the vast majority of employees will not be able to vindicate their employment rights without the benefit of class actions.

We realize that in the present case before the Court, petitioner AT&T Mobility LLC (ATTM) has attempted to obviate the need for any particular consumer claimant to resort to a class action to protect his or her own immediate rights. With seeming magnanimity, petitioner has agreed to finance any arbitration where the arbitrator awards a claimant more than ATTM's last settlement offer. As we shall demonstrate below, this seeming magnanimity masks the loss of two other major virtues of class actions. For the moment, however, it is enough to say that ATTM's approach itself is an implicit acknowledgment of our basic proposition: a class action – or something of an equivalent nature – is an essential procedure for the vindication of the rights of claimants of modest means with modest claims.

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[14] The Consumer Price Index in 1995 was 152. In 2009 it was 214, an increase of 40%. U.S. Dep't Labor, Bur. Lab. Stat., *available at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (last visited September 9, 2010).

[15] Median annual earnings are $36,587 and the median duration of unemployment is 19.9 weeks. U.S. Dep't Labor, Bur. Lab. Stat., *available at* http://www.bls.gov/ncs/ocs/sp/nctb1346.txt; http://www.bls.gov/news.release/empsit.t12.htm (last visited September 9, 2010).

[16] Howard, *supra* note 13, at 44-45.

III. CLASS ACTIONS SERVE TWO VITAL FUNCTIONS BEYOND THE VINDICATION OF ANY ONE INDIVIDUAL'S RIGHTS: THEY ALERT CLASS MEMBERS TO THE EXISTENCE OF THEIR RIGHTS, AND A BROAD AND AGGREGATED AWARD IS A MAJOR DETERRENT TO CONTINUED VIOLATIONS.

Many individual consumers and rank-and-file employees are woefully ignorant of their rights – or lack of rights. See, *e.g.*, Lewis Maltby, Can They Do That? Retaking Our Fundamental Rights in the Workplace 1-4 (2009); American Bar Ass'n, Family Legal Guide xi-xv (3d ed. 2004). A major aim of a class action is to educate the members of the class about the rights they may not realize they possess until the class action brings the matter to their attention. Even the seemingly generous approach of petitioner AT&T Mobility negates this significant benefit. The proverbial squeaky wheel gets the grease – but all the other, similarly situated "wheels" – the other unsuspecting, less knowledgeable consumers or employees – are left unattended and without a remedy.

Another essential objective of a class action is to get a sufficiently broad and substantial corrective order to stop the wrongdoing and to deter future misconduct. Sometimes that is simply a matter of the larger amount of money awarded to a group rather than to an individual claimant. But a paper delivered at a recent annual meeting of the National Academy of Arbitrators (NAA) also pointed out that "company-wide reforms are generally not available in the single-plaintiff context – even *after* a liability finding against the employer."[17] Cited as an

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[17] Adam Klein & Nantiya Ruan, *Mandatory Arbitration of Employment Class Action Disputes: From the Perspective*

example was *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955 (11th Cir. 2008), where the trial court dismissed the employees' pattern-and-practice claims on the grounds they could proceed only as a class action and the plaintiffs had not sought class certification.

Other papers presented at the same NAA meeting shed more valuable light on these dual functions of class actions – education and effective enforcement. Professor Martin Malin relied on *Gentry v. Superior Court*, 165 P. 3d 556 (Cal. 2007),[18] to the effect that "class actions may be necessary to protect the statutory rights of employees other than the individual plaintiff because incumbent employees may fear retaliation if they bring individual claims, and because many claimants may be unaware of their rights."[19] More broadly, Arbitrator and Adjunct Professor Barry Winograd took note of the position that "class actions play a significant and favored role in protecting the public's interest in full enforcement of important statutes for the benefit of employees, consumers, borrowers, and others."[20]

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of Plaintiffs' Counsel, in Arbitration 2008 – U.S. and Canadian Arbitration: Same Problems, Different Approaches, Proceedings of the Sixty-First Annual Meeting of the National Academy of Arbitrators 142, 145 (Patrick Halter & Paul D. Staudohar eds. 2009; hereinafter "Arbitration 2008") (emphasis in the original).

[18] *Cert. denied sub nom* Circuit City Stores, Inc. v. Gentry, 552 U.S. 1296 (2008).

[19] Martin H. Malin, *Class Action Waivers in Arbitration Agreements: The Chaotic State of the Law*, in Arbitration 2008, *supra* note 17, at 111, 119-20.

[20] Barry Winograd, *An Introduction to Mandatory Arbitration and Class Action Waivers*, in Arbitration 2008, *supra* note 17, at 127, 134.

Petitioner AT&T Mobility's stratagem in this case accommodates (to an extent) the one vigilant individual. It can totally nullify the interests of the other class members – and the public interest – that the class action was designed to promote.

CONCLUSION

For the reasons stated here and in the brief *amicus curiae* of the National Academy of Arbitrators and the brief of the respondents, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views and the views of its supporters on whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), should preempt a state court's rule of decision that effectively creates a blanket *per se* rule invalidating consumer arbitration agreements that are limited to individual arbitration, when generally applicable state contract law requires careful consideration of all of the terms of the specific arbitration agreement at issue.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, amicus notes that on June 17 and June 21, 2010, counsel for petitioner and counsel for respondents respectively filed a blanket consent to the filing of amicus curiae briefs, in support of either or neither party.

and small businesses from all parts of New England and the United States.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to New England's business community.[2] This is such a case, and NELF believes that this brief provides an additional perspective to aid the Court in deciding the issue presented within.

SUMMARY OF ARGUMENT

The FAA requires courts to treat arbitration agreements on an equal footing with all other contracts and bars courts from singling out arbitration agreements for suspect status. Contrary to this clear statutory mandate, the Ninth Circuit in this case has

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[2] *See, e.g., Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

enforced a rule of decision created by the California Supreme Court in *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005), that singles out class arbitration waivers in consumer arbitration agreements and effectively invalidates them *per se*. This special rule, applicable only to certain arbitration agreements, is a drastic departure from general California contract law, which requires careful consideration of all of the terms of an agreement--in this case the agreement to arbitrate on an individual basis only--to determine whether it is unconscionable.

While the Ninth Circuit acknowledged that the agreement at issue between the petitioner AT&T Mobility LLC ("ATTM") and the respondents contained many consumer-friendly terms that allowed for the vindication of small, individual claims, the court nevertheless dismissed these otherwise dispositive facts as inconsequential under *Discover Bank*. Instead, the court focused narrowly and exclusively on the fact that the claims at issue were small-value consumer claims as a basis for determining unconscionability. In so doing, the court deviated markedly from general California contract law, and its decision should be reversed under the FAA.

The *Discover Bank* rule applied by the Ninth Circuit also has broader, more damaging

implications. While in this case the Ninth Circuit's invalidation of ATTM's waiver would apparently also invalidate the entire arbitration agreement under the contract's nonseverability clause, the Court's recent decision in *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), would likely compel the same result with respect to *any* arbitration agreement with an invalidated class waiver, whether or not the agreement contained a nonseverability clause. The implications of *Stolt-Nielsen* in this case are therefore sweeping. If allowed to stand, the Ninth Circuit's decision and the *Discover Bank* rule could have the effect, in California at least, of invalidating, in its entirety, virtually every consumer arbitration agreement containing a class action waiver.

Finally, the Ninth Circuit's decision should be reversed because the *per se* rule of unconscionability that it applies may actually harm consumers. Simply put, the lower court's application of the *Discover Bank* rule may well discourage businesses from continuing to offer low-cost and efficient procedures for resolving disputes as an alternative to traditional litigation.

ARGUMENT

I. The FAA should preempt state law when it singles out consumer arbitration agreements and *per se* invalidates them when they bar class arbitration.

At issue in this case is the validity, under the FAA, of the Ninth's Circuit's application of a state rule of decision that transforms the general contract defense of unconscionability from an inquiry into the particular terms of an agreement into a rigid *per se* rule when applied to consumer arbitration agreements. The necessary starting point in resolving this issue is Congress's intent. Section 2 of the FAA requires courts to enforce arbitration agreements according to their terms, "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). As this Court has recently explained,

> The FAA . . . places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms . . . Like other contracts, however, they may be invalidated by *generally applicable contract defenses*, such as fraud, duress, or unconscionability.

Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (internal citations and quotations omitted) (emphasis added).

It follows from these principles that the FAA preempts any state law that singles out arbitration agreements for suspect status. *See Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The essential inquiry under the Court's precedents is whether the challenged state law, in this case a judicial rule of decision, imposes burdens on arbitration agreements that do not apply to contracts generally. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687; *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

In this light, the Ninth Circuit's decision invalidating AT&TM's class action waiver should be reversed because it rests on its application of a special rule invalidating class action waivers in consumer arbitration agreements that the California Supreme Court announced in *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005). In that case, the California Supreme Court held that a class action waiver in a consumer arbitration agreement is unconscionable as a matter of law if it is contained within a "consumer contract of adhesion," if the claim is of a kind that "predictably involve[s] small amounts of damages," and "when it is alleged that the

party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money[.]" *Discover Bank*, 113 P.3d at 1110.[3] The Ninth Circuit in this case applied the *Discover Bank* rule to invalidate ATTM's class action waiver and deny ATTM's motion to compel arbitration. *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 854-55, 859 (9th Cir. 2009).

The *Discover Bank* rule applied by the Ninth Circuit in this case offends the FAA for many reasons. First, the rule does not apply to "any contract," as required by § 2 of the FAA, but instead applies only to consumer contracts containing class action waivers, which occur almost exclusively in mandatory arbitration provisions.[4] For this reason alone, the FAA

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[3] California broadly defines a contract of adhesion as any unilateral, "take-it-or-leave-it" contract, in which "the party of superior bargaining strength[] relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Discover Bank v. Super. Ct.*, 113 P.3d at 1108 (internal quotations and citations omitted). *See also Szetela v. Discover Bank*, 118 Cal.Rptr.2d 862, 867 (Cal. Ct. App. 2002) ("When the weaker party is presented the [contract] and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.") Accordingly, every consumer form contract in California would automatically satisfy the first prong of the *Discover Bank* rule.

[4] While the *Discover Bank* test could theoretically apply to a contractual waiver of the right to bring a class action

should invalidate the *Discover Bank* rule and require reversal of the decision below.

But, the *Discover Bank* rule offends the FAA even further because it operates to invalidate class action waivers in consumer arbitration agreements on a *per se* basis, thereby treating them differently from any other contract term that has been attacked as unconscionable.[5] *Discover Bank* creates an

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litigation, the FAA should still preempt the rule because it would not apply to contracts generally, as required by § 2 of the FAA ("save upon such grounds as exist . . . for the revocation of *any* contract") (emphasis added). *See also Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 724-25 (4th Cir. 1990) (FAA preempts state franchise law voiding contract term denying dealers access to "procedures, forums or remedies" under state law, even though statute silent on arbitration and could apply to non-arbitration contract provisions such as forum selection clauses). In any event, class action waivers occur almost exclusively in arbitration agreements and rarely arise in the litigation context. *See Bonanno v. Quizno's Franchise Co., LLC*, 2009 WL 1068744, at *12 (D. Colo. Apr. 20, 2009) (in dispute arising under franchise agreement with class litigation waiver, noting only one other case involving class action waiver outside arbitration context).

[5] Furthermore, as is discussed below, this Court's recent holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), indicates that a decision invalidating the class waiver also invalidates the entire arbitration provision, at least with respect to class claims.

irrebuttable presumption that a class action waiver in a consumer form contract functions as an unlawful exculpatory clause (and is therefore unconscionable) if the plaintiff merely shows that the claims are predictably small, and if she merely *alleges* that the business defendant has engaged in a scheme to wrongfully deprive large numbers of consumers of individually small sums of money. *See Laster v. AT & T Mobility*, 584 F.3d at 856; *Discover Bank*, 113 P.3d at 1110. In short, the *Discover Bank* standard, which drives the Ninth Circuit's decision, creates a *per se* rule that class arbitration waivers in most consumer form agreements in California are unconscionable. But this is precisely what the FAA does not permit.

To the contrary, the FAA's mandate is that only "generally applicable contract defenses" can operate to invalidate an arbitration agreement. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. at 2776. But clearly this *per se* rule against consumer class action waivers departs markedly from general California law of unconscionability. Unlike the rigid *Discover Bank* rule, the generally applicable unconscionability standard involves a "sliding scale" approach, under which courts weigh varying degrees of procedural and substantive factors to determine a particular contract's overall fairness at the time of its formation. *See Armendariz v. Found. Health*

Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); Cal. Civ. Code § 1670.5(A) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable *at the time it was made*[,] the court may refuse to enforce the contract.") (emphasis added). In short, the Ninth Circuit's application of the *Discover Bank* rule violates the FAA because it creates a special, *per se* rule of unconscionability that targets class action waiver provisions in consumer arbitration agreements, thus deviating markedly from the general California law of unconscionability, which considers all of the terms of a particular agreement in determining its overall fairness at the time of contract formation.

For these reasons, it is clear that the FAA should have precluded the Ninth Circuit's application of the *Discover Bank* rule and should now require reversal of the lower court's decision. As the Ninth Circuit expressly acknowledged, AT & T's agreement allows for the vindication of individual claims: "The [agreement] does essentially guarantee that the company will make any aggrieved customer whole who files a claim[.]" *Laster*, 584 F.3d at 856 n.9. The court also acknowledged the agreement's many generous terms designed to facilitate the speedy and inexpensive resolution

of claims. *Id.*, 584 F.3d at 855-56.[5]

But, rather than complying with the general California law of unconscionability, which would have required consideration of the overall fairness of the agreement's terms, the Ninth Circuit instead dismissed them as inconsequential under *Discover Bank*. The court instead focused narrowly and exclusively on the fact that the claims at issue were small-value consumer claims as a basis for determining unconscionability. *Id.* at 856 & nn. 8-9. In so doing, the court departed drastically from the general California law of

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[5] As ATTM has pointed out, on page 1 of Brief for Petitioner, one veteran federal judge has noted that ATTM's agreement "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v. AT & T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D.Cal. June 18, 2009) (rejecting unconscionability challenge to same agreement and compelling arbitration). Specifically, the arbitration provision requires ATTM to pay all arbitration fees for non-frivolous claims, authorizes the arbitrator to award punitive damages and injunctions, and requires a minimum award of $7,500 and double attorney's fees if the arbitral award exceeds ATTM's last written settlement offer. *Laster v. AT & T Mobility, LLC*, 584 F.3d at 853, 856 n.10. The agreement also provides for arbitration in the customer's home county, allows the customer to choose between in-person, phone, and desk arbitration, and disclaims any right ATTM may have had to pursue attorney's fees from a customer. *Id.*, at 856 n.10.

unconscionability and treated an arbitration clause differently from "any contract," in violation of § 2 of the FAA.

Finally, it should be noted that, while in this case the Ninth Circuit's invalidation of ATTM's waiver would apparently also invalidate the entire arbitration agreement, pursuant to the contract's nonseverability clause,[7] the Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), would likely compel the same result with respect to *any* arbitration agreement with an invalidated class waiver, whether or not the agreement contained a nonseverability clause. In *Stolt-Nielsen*, the Court, applying the bedrock principle that arbitration is entirely a matter of the parties' consent, held that the FAA precludes compelling a party to submit to class arbitration "unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1764 (emphasis in original). A class action waiver evinces the drafting party's clear intent that it has not agreed to and in fact has opposed class arbitration.[8] Therefore, under *Stolt-Nielsen*, a

[7] The nonseverability clause in ATTM's agreement is reproduced on page 61A of the appendix to ATTM's Petition for a Writ of Certiorari, at ¶ 6.

[8] There should be no question that a business's clear intent not to consent to class arbitration, as expressed in

party that has included a class action waiver in its arbitration agreement cannot be compelled to submit to class arbitration.

However, when a court, as in this case, invalidates a class action waiver, it has concluded that individual parties to an agreement must be allowed to aggregate their claims. Since *Stolt-Nielsen* bars a court from ordering class arbitration where the parties have not agreed to it, individuals wishing to aggregate their claims must be allowed to do so in court. Thus, the upshot of invalidating the waiver must be invalidation of the entire arbitration agreement, at least with respect to parties wishing to aggregate their claims.

The implications of *Stolt-Nielsen* in this

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a class action waiver, should survive a determination that the waiver is unconscionable. This is so because determining a party's contractual intent is separate and distinct from determining whether that intent is enforceable. *See Rent-A-Center, W., Inc. v. Jackson*, 2010 WL 2471058, at *4 n 1 (June 21, 2010) (discussing difference between contractual intent and validity for purposes of parties' delegation of "gateway" issues to arbitrator). *See also Fensterstock v. Educ. Fin. Partners*, 2010 WL 2729759, at *14 (2d Cir. July 12, 2010) ("Our conclusion that a given agreement is invalid and unenforceable does not mean that the parties in fact reached the opposite agreement."). In any event, *Stolt-Nielsen* clearly establishes that even contractual silence on the issue of class arbitration is insufficient to establish a party's consent to class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1776-77.

case are therefore sweeping. Since the *Discover Bank* rule and the Ninth Circuit's decision amount to a *per se* prohibition on class action waivers in consumer arbitration agreements, a decision by this Court upholding the Ninth Circuit's application of that rule could have the effect, in California at least, of allowing all California consumers who seek class certification to avoid arbitration agreements altogether and bring class actions in court. Congress simply could not have intended any such wholesale undermining of arbitration agreements under the FAA. Quite to the contrary, "the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal quotations and citations omitted). Accordingly, the Ninth Circuit's decision, and the California Supreme Court's *Discover Bank* rule upon which the Ninth Circuit's decision is based, should be reversed as in violation of the FAA.

II. If allowed to stand, the Ninth Circuit's decision could harm consumers by discouraging businesses from offering generous arbitration provisions designed to ensure the inexpensive and convenient resolution of individual claims.

The Ninth Circuit's decision not only offends the FAA but it may also harm consumers by discouraging businesses from offering the type of consumer-friendly terms contained in the agreement in this case, thereby depriving consumers of an inexpensive and convenient procedure for the resolution of small claims. As ATTM has explained in its brief, "[it] has revised its arbitration provision over time in order to make bilateral [i.e., individual] arbitration a realistic and effective dispute-resolution mechanism for consumers." Brief for Petitioner, at 5. The evolution of ATTM's arbitration agreements illustrates how a business that seeks to limit arbitration to individual claims has provided, as a *quid pro quo* for this limitation, a number of generous terms to encourage and ensure the prompt and informal resolution of disputes. Consumers clearly benefit from the fruits of this contractual arrangement—a streamlined and virtually free procedure for the resolution of individual claims that dispenses with the formalities, costs, and delays typical of the

judicial forum. An agreement such as ATTM's embodies the virtues of arbitration long recognized by this Court, namely an alternative forum "[for] obtaining a prompt and inexpensive resolution of [parties'] disputes . . . ." *Nolde Bros., Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977).

Indeed, given ATTM's likely goal of ensuring the practical and inexpensive resolution of individual claims, it is not surprising that ATTM's arbitration agreement provides terms that are above and beyond what is minimally required under California unconscionability law. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000) (specifying "certain minimum requirements" to avoid unconscionability as including "neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration"). For example, as discussed in n.6 above, ATTM's agreement provides that the company will assume all arbitration costs and fees for non-frivolous claims. *Laster v. AT & T Mobility LLC*, 584 F.3d at 856 n.10. This term is not necessarily required under California law. Indeed, one California court has upheld an arbitration agreement imposing "the entire cost of the arbitration, including legal fees" on the losing

party. *Lagatree v. Luce, Forward, Hamilton & Scripps*, 88 Cal.Rptr.2d 664, 667, 683-87 (Cal. Ct. App. 1999) (rejecting employee's challenge to validity of employer's fee-allocation provision in arbitration agreement). Nor does California law require ATTM to include its $7,500 premium payment provision for failure to make a reasonable pre-arbitration settlement offer. *Laster*, 584 F.3d at 855-56. This provision creates a powerful and consumer-friendly incentive for ATTM to resolve claims promptly and informally, even before arbitration has begun.

It is also notable that, prior to the *Discover Bank* decision, California courts had upheld AT &T's consumer-friendly agreements with class waivers precisely because they ensured the vindication of individual claims:

> [T]he cost to the customer [in arbitration] is limited to $25 on claims under $1,000; AT & T will pay all other administrative costs and fees. . . . AT & T's subscribers are not deterred from seeking redress for small amounts . . . Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

Bucy v. AT & T Wireless Servs., Inc., 2005 WL

1168371, at *6 (Cal. Ct. App. May 18, 2005) (enforcing consumer arbitration agreement with class action waiver). Significantly, the California Supreme Court issued its *Discover Bank* decision shortly after the California Appeals Court decided *Bucy v. AT & T*, quoted above. After remand by the California Supreme Court in light of *Discover Bank*, the California Appeals Court in *Bucy* reversed itself and held that the class waiver at issue was unconscionable. *Bucy v. AT & T Wireless Servs., Inc.*, 2005 WL 2404424, at *1 (Cal. Ct. App. Sep. 30, 2005).

If allowed to stand, however, the Ninth Circuit's decision would defeat this carefully crafted *quid pro quo* between consumers and businesses by effectively requiring businesses that wish to provide arbitration as a means of dispute resolution to agree to class arbitration in consumer arbitration agreements, at least in California. After all, the Ninth Circuit in this case, having viewed ATTM's agreement through the pinched and severe lens of *Discover Bank*, expressly disregarded the extent to which the numerous consumer-friendly terms in the agreement could minimize or outweigh the impact of the class waiver. Because these beneficial terms were likely intended to obviate the need for class arbitration by enhancing the procedures and remedies associated with individual claims, a *per se* ban on class waivers would, at the least, destroy the incentive for

businesses to provide such enhanced consumer-friendly terms in arbitration agreements. If in fact businesses do remove such terms from their consumer agreements, it is consumers, and not businesses, that will suffer. Consumers could lose many informal and convenient procedures for the resolution of their individual claims, a unique process that is neither required by law nor available in litigation.

In sum, a decision affirming the Ninth Circuit's application of *Discover Bank* may well sacrifice the interests of consumers and the virtues of arbitration for the sake of an abstract, *a priori* policy assumption that consumers must be allowed to aggregate their claims at all costs. Such a deleterious result would be inimical to the FAA's purpose of fostering arbitration as a practical and convenient tool for the resolution of disputes.

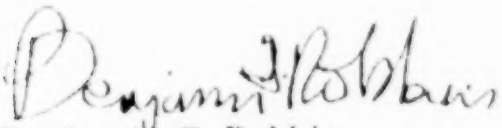
CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the Ninth Circuit's decision.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By their attorneys,



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In the

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

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INTEREST OF AMICUS CURIAE[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act (FAA) and contractual arbitration in general, including this case at the petition stage. *See, e.g.*, *Athens Disposal Co., Inc. v. Franco*, 130 S. Ct. 1050 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Circuit City Stores, Inc. v. Gentry*, 552 U.S. 1296 (2008); and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case was brought under diversity jurisdiction in the federal courts, but the Ninth Circuit below applied California law and it is, in fact, the California courts' open hostility to arbitration that is the crux of the problem exemplified in this case.

Just weeks ago, this Court reaffirmed that Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, to overcome judicial resistance to arbitration and that the savings clause of Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts. *Rent-a-Center v. Jackson*, docket no. 09-497, slip op. at 3 (decided June 21, 2010). *See also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Under this federal substantive law, arbitration contracts are to be construed as any other contract, not subjected to more stringent review or disfavor because the subject matter is arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

These matters have been settled law for 25 years. California courts, however, still scrutinize arbitration with suspicion and dislike, and invalidate arbitration contracts with distressing regularity. Most commonly, California courts invoke unconscionability principles to invalidate the contracts. However, the unconscionability doctrine is not applied neutrally among all types of contracts, resulting in the disproportionate invalidation of arbitration provisions as opposed to other contracts. For example, parties to an arbitration contract are held to a higher standard of "mutuality" than parties to other types of contracts, and the "sliding scale" of unconscionability analysis does not

apply to arbitration contracts: a low level of procedural unconscionability should require a high level of substantive unconscionability, but in California, a finding of the most minimal suggestion of both types will do. Additionally, California courts analyzing arbitration contracts hold the existence of market alternatives to be irrelevant to whether the contract formation was marred by procedural unconscionability, but do consider the availability of market alternatives to be a significant factor in the analysis of other types of contracts. These features of California jurisprudence, which infect federal courts exercising diversity jurisdiction, as in this case, interfere with the normal and proper functioning of the California marketplace, injuring businesses and consumers alike.

ARGUMENT

I

CALIFORNIA'S UNCONSCIONABILITY DOCTRINE UNIQUELY DISFAVORS ARBITRATION CONTRACTS

This Court has recognized that the freedom to make and enforce contracts reflects a fundamental element of free choice and should be protected for that reason. *See, e.g.*, *Stolt-Nielsen*, 130 S. Ct. at 1774 ("Underscoring the consensual nature of private dispute resolution, we have held that parties are '"generally free to structure their arbitration agreements as they see fit."'") (citation omitted); *Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City*

Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). For this reason, state law grounds for invalidation must not "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue . . . . A court may not . . . rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (holding that the FAA preempts California Labor Code § 229 insofar as the statute allowed litigation in court to collect wages without regard to the existence of any private arbitration agreement). Or, as the Court rephrased the point in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), "Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." Yet this is *exactly* the tactic adopted by the Ninth Circuit below, applying California law.

While the FAA permits state courts to apply "ordinary principles of unconscionability," the FAA forbids state courts from implementing substantive state policies that undermine arbitration clauses. Moreover, "a state cannot evade FAA preemption simply by labeling procedures which are inconsistent with its substantive policies as unconscionable." Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 Bus. Law. 1289, 1295 (2003). Similarly, this Court's arbitration jurisprudence does

not permit a state to use unconscionability as a ground for voiding arbitration agreements in certain classes of disputes just because the state court believes those disputes are better handled by some other means of dispute resolution. *See Preston v. Ferrer*, 552 U.S. at 359 ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."). As one commentator noted:

> [T]he United States Supreme Court surely would review state courts' unconscionability rulings to the extent necessary to prevent the unconscionability doctrine from effectively nullifying the FAA with respect to a huge class of contracts. Indeed, the Court has twice stated that state courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."

Stephen J. Ware, *Alternative Dispute Resolution* § 2.25(b), at 58 (West 2001) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687-88 n.3; *Perry*, 482 U.S. at 492 n.9. That is, a court may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

Moreover, unconscionability is a notoriously flexible concept. *See* Joseph M. Perillo, *Corbin on Contracts: Avoidance & Reformation* § 29.1 (rev. ed. 2002) ("Unconscionability is one of the most amorphous

terms in the law of contracts."). The flexibility no doubt stems from the original purpose of the unconscionability doctrine: to protect consumers. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & Econ. 293, 302 (1975) ("Ideally, the unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them."). However, the doctrine was not written to enable courts to do justice by rewriting contracts. In fact, in the official comments to Uniform Commercial Code § 2-302 (2003), the drafters explained that the unconscionability principle "is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *See id.*, official comment 1 (emphasis added); *accord* Cal. Civ. Code § 1670.5, Legis. Comm. Cmt. (same).

Nonetheless, California courts have found the unconscionability doctrine to be a valuable tool to invalidate arbitration contracts. In so doing, California has developed a deserved reputation as "hostile" to arbitration. An empirical analysis conducted by Stephen Broome revealed that unconscionability challenges in California succeed against arbitration provisions with far greater frequency than any other type of contract provision. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39 (2006). Broome identified 114 cases in which the California Courts of Appeal considered the unconscionability of arbitration contracts; in fifty-three of those cases, the arbitration provision was held unconscionable and unenforceable and another thirteen found some aspect of the

arbitration provision to be unconscionable and severed it. *Id.* at 44-45.[2] Forty-eight cases upheld the arbitration contract. By way of contrast, of the forty-six unconscionability claims made outside the context of arbitration, forty-one of the contracts were upheld by the courts, while only five were struck down as

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[2] Broome's survey included cases decided from 1982 to 2006. The starting date was set by California's adoption of the currently existing unconscionability doctrine in *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982). Broome, 3 Hastings Bus. L.J. at 44 n.33. Since 2006, court invalidation of arbitration clauses on grounds of unconscionability has, if anything, accelerated. *See Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 826 (2010); *Borison v. Gibbs, Giden, Locher, Turner & Senet*, No. B216428, 2010 Cal. App. Unpub. LEXIS 874 *16 (Feb. 5, 2010); *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1585 (2009); *Olvera v. El Pollo Loco, Inc.*, 173 Cal. App. 4th 447, 457 (2009); *Sanchez v. W. Pizza Enters., Inc.*, 172 Cal. App. 4th 154, 181 (2009); *Duran v. Discover Bank*, No. B203338, 2009 Cal. App. Unpub. LEXIS 4947 *19 (June 19, 2009); *Fuentes v. Rent-A-Center, Inc.*, No. A121673, 2009 Cal. App. Unpub. LEXIS 6209 *44 (July 31, 2009); *Aguilar v. F.S. Hotels (L.A.) Inc.*, No. B210159, 2009 Cal. App. Unpub. LEXIS 7007 *15 (Aug. 28, 2009); *Vu v. Superior Court*, No. 213988, 2009 Cal. App. Unpub. LEXIS 9072 *14 (Nov. 17, 2009); *Geller v. Wedbush Morgan Secs., Inc.*, No. 211579, 2009 Cal. App. Unpub. LEXIS 10117 *20 (Dec. 21, 2009); *Tourangeau v. LBL Ins. Servs., Inc.*, No. G038637, 2008 Cal. App. Unpub. LEXIS 3727 *12 (May 6, 2008); *Stiglich v. Jani-King of Cal., Inc.*, No. D051811, 2008 Cal. App. Unpub. LEXIS 9390 *35 (Oct. 28, 2008), *rev. denied*; *Kim v. Francesca's Collections of Cal., Inc.*, No. B207572, 2009 Cal. App. Unpub. LEXIS 2958 *15 (Apr. 16, 2009); *Murphy v. Check 'N Go of Cal., Inc.*, 156 Cal. App. 4th 138, 149 (2007). *Cf. D.C. v. Harvard-Westlake School*, 176 Cal. App. 4th 836, 869 (2009) (no procedural unconscionability where parents had opportunity to convince private school administrators to remove offending provision from enrollment contract containing an arbitration clause).

unconscionable. *Id.* at 47. By targeting arbitration provisions for exceptionally harsh review under the unconscionability doctrine, California courts violate Section 2 of the FAA, which demands that arbitration contracts be considered on "equal footing" with any other contract. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36 (1991).

II

CALIFORNIA COURTS APPLY SPECIAL TESTS TO ARBITRATION CONTRACTS, BUT NOT OTHER TYPES OF CONTRACTS

California courts and the Ninth Circuit below restate the definition that unconscionability means "shocks the conscience," traditionally meaning something no man would contemplate unless he were delusional. *Kinney v. United HealthCare Services, Inc.*, 70 Cal. App. 4th 1322, 1330 (1999) ("'Substantive unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to "shock the conscience."'") (citations omitted); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1075 (9th Cir. 2007). But these formulations are drained of all meaning if they can be applied to the extremely consumer-friendly arbitration contract in this case, containing provisions that "essentially guarantee that the company will make any aggrieved customer whole who files a claim." *Laster v. AT&T Mobility, LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009). Moreover, the California courts employ an array of special tests to arbitration contracts—and only to arbitration contracts—all in the service of finding a reason to

strike them down. These tests, described more fully below, are: the "mutuality" test, the sliding scale that doesn't slide, and a refusal to consider marketplace alternatives.

A. California Uniquely Employs a "Mutuality Test" to Arbitration Contract Challenges

What accounts for the California courts' willingness to invalidate arbitration contracts as unconscionable as opposed to contracts in other contexts? Mostly, the culprit is a special test that California courts apply to unconscionability claims brought only against arbitration contracts. This test—the "mutuality test"—first appeared in *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997), in which the court held that a contract that requires one party to arbitrate but not the other is so "one-sided" as to be unconscionable. *Id.* at 1532. The *Stirlin* court repeatedly labeled the contract between the parties as a "contract of adhesion" (and element of unconscionability), implicitly contradicting earlier California law by assuming that the label would be dispositive of the legal issues. *Id.* at 1533; *see also Kinney*, 70 Cal. App. 4th at 1332 (invalidating "unilateral obligation to arbitrate"). Yet this disdain of adhesion contracts itself betrays a certain bias.

> "The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced . . . ." That is because there are important advantages to its use despite its potential for abuse. These advantages include the fact that standardization of forms for contracts is a rational and economically efficient response to the

> rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.

Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) (citing *Roberson v. The Money Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1526 n.6 & n.10 (M.D. Ala. 1997)).[3]

While expressing a purported concern for public policy, however, none of those advantages were even acknowledged by the California Supreme Court, and that court adopted the mutuality test in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 117 (2000), announcing that arbitration

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[3] Richard Epstein explains why the "mutuality argument" cannot be a legitimate basis for declaring a contract unconscionable:

> A could not complain if B decided not to make him any offer at all; why then is he entitled to complain if B decides to make him *better off* by now giving him a choice when before he had none? If A does not like B's offer, he can reject it; but to allow him to first accept the agreement and only thereafter to force B to work at a price which B finds unacceptable is to allow him to resort (with the aid of the state) to the very form of duress that on any theory is prohibited. There is no question of "dictation" of terms where B refuses to accept the terms desired by A. There is every question of dictation where A can repudiate his agreement with B and hold B to one to which B did not consent; and that element of dictation remains even if A is but a poor individual and B is a large and powerful corporation. To allow that to take place is to indeed countenance an "inequality of bargaining power" between A and B, with A having the legal advantage as he is given formal legal rights explicitly denied B.

Epstein, *supra*, at 297.

agreements must contain a "modicum of bilaterality." Since *Armendariz*, more than two-thirds of the courts that invalidated arbitration provisions did so because the provisions lacked mutuality. Broome, 3 Hastings Bus. L.J. at 50-51; *see also* Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 Hastings L.J. 987, 1002 (2004) ("[I]n *Armendariz*, the court honed California unconscionability law into a weapon that could be used against mandatory arbitration agreements."). Indeed, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161 (2005), the California Supreme Court employed a form of the mutuality test to strike down class-arbitration waivers. In the court's view:

> [C]lass action or arbitration waivers are indisputably one-sided. "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits."

Id. (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002), *cert. denied*, 537 U.S. 1226 (2003)). The court in *Gentry v. Superior Court*, 42 Cal. 4th 443, 470-72 (2007), *cert. denied* sub nom., *Circuit City Stores, Inc. v. Gentry*, 552 U.S. 1296 (2008), also relied on what it perceived as the one-sided nature of the contract in striking down Circuit City's class-arbitration waiver. Although some language in *Armendariz* suggests that lack of mutuality can be justified by "business realities," *Armendariz*, 24 Cal.

4th at 117, no lower California court has yet identified a business reality sufficient to justify lack of mutuality in an arbitration agreement. Broome, 3 Hastings Bus. L.J. at 54 (citing Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 81 (2005)).[4] *See also Thomas H. Riske, No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts' Disdain for Arbitration Agreements*, 2008 J. Disp. Resol. 591, 602-04 (2008) (The supposed "business realities" exception to the mutuality test, which uses terminology associated with general contract law, but which has been factually impossible to successfully invoke, provides another illustration of how California courts hold arbitration agreements to a unique standard.). The mutuality test thus makes it significantly easier to challenge arbitration agreements as unconscionable.

Yet this Court held that "[t]he 'goals and policies' of the FAA . . . are antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs., Inc.*, 517 U.S. at 688. Given this straightforward holding, jurisdictions other than California have been unwilling to adopt a requirement

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[4] Some federal district courts, applying California law, will occasionally find that the mutuality requirement was met and uphold an arbitration agreement. *See Rutter v. Darden Rests., Inc.*, No. CV-08-6106, 2008 U.S. Dist. LEXIS 96170, at *19 (C.D. Cal. Nov. 18, 2008); *Rodriguez v. Sim*, No. C-08-3982, 2009 U.S. Dist. LEXIS 39445, at *12 (N.D. Cal. Apr. 10, 2009); *Ramirez-Baker v. Beazer Homes, Inc.*, 636 F. Supp. 2d 1008, 1021 (E.D. Cal. 2008).

of mutuality for arbitration agreements. *See, e.g., Ex Parte McNaughton*, 728 So. 2d 592, 598 (Ala.), *cert. denied*, 528 U.S. 818 (1999) (A mutuality approach relies on the "uniqueness of the concept of arbitration," "assigns a suspect status to arbitration agreements," and therefore "flies in the face of *Doctor's Associates*."). *See also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) ("[S]ubstantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate"); *In re Pate*, 198 B.R. 841, 844 (S.D. Ga. 1996) (same result under Georgia law); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001) ("[T]he doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.").[5]

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[5] *See also State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) ("There is no reason to create a different mutuality rule in arbitration cases. Both parties to this contract exchanged consideration in this sale of a home. The contract will not be invalidated for lack of mutuality of obligation of the arbitration clause."); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) ("[T]he agreement is not unconscionable because, even though the arbitration clause lacks mutuality of obligation, the underlying contract for the sale of Dell computers is supported by adequate consideration."); *In re Lyon Financial Servs., Inc.*, 257 S.W.3d 228, 233 (Tex. 2008); *Walther v. Sovereign Bank*, 386 Md. 412, 433 (Md. 2005); *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004). Other than California, only Arkansas routinely invokes mutuality as a reason to invalidate arbitration contracts. *See, e.g., Advance America Servicing of Ark., Inc. v. McGinnis*, 375 Ark. 24, 35 (2008).

Meanwhile, outside the arbitration context, California courts do not demand mutuality either. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1488-89 (1998) (unilateral mortgage agreement upheld because "[w]here sufficient consideration is present, mutuality is not essential"); *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 752 (1984) (upholding unilateral employment contract where consideration requirement is properly met; a "mutuality of obligation" is unnecessary). Thus, California's "mutuality" approach to determining substantive unconscionability in arbitration provisions differs from the standard used to analyze ordinary contractual provisions for unconscionability. Under the mutuality test, the court relies on its own speculation that the arbitral proceeding itself might impede a party's ability to obtain the requested relief.

For nonarbitration contractual provisions, California courts invalidate contracts as unconscionable only upon evidence of measurable, inevitable hardship if the disputed term is enforced. *See Phoenix Leasing Inc. v. Johnson*, No. A089871, 2001 Cal. App. Unpub. LEXIS 2201, at *16-17 (Oct. 29, 2001) (invalidating provision that would have given lender $208,000 of unaccrued interest); *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 411 (1995) (invaliding landlord's attempt to appropriate a portion of the sale price of a lease); *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 83 (1991) (invalidating interest rate of 200% per annum on a secured $99,000 loan); *Ellis v. McKinnon Broadcasting Co.*, 18 Cal. App. 4th 1796, 1806 (1993) (invalidating contract that gave employer all of employee's sales commissions (which were the employee's sole compensation) that were received after

the employee left the company when the sales were generated by the employee prior to his voluntary departure); *Johnisee v. Kimberlite Corp.*, No. A107341, 2003 Cal. App. Unpub. LEXIS 11228, at *27-28 (Nov. 26, 2003) (same).[6]

B. California Courts Pay Lip Service to the Sliding Scale Test of Unconscionablity, but Routinely Ignore It in Application

Under California law, a finding of unconscionability requires both procedural and substantive unconscionability, as measured on a sliding scale (the more substantively unconscionable the contract term, the less procedurally unconscionable it need be to be unenforceable and vice versa). Thus, adhesiveness—an element of procedural unconscionability—should never be sufficient to render a contract unenforceable in California law; there must be some element of substantive unconscionability as well. *See Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819-20 (1981). The decision below recites this rule, and claims that *Discover Bank* merely refined, but did not alter it. *AT&T Mobility*, 584 F.3d at 853, 857 (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007)). Yet as a practical matter, California courts do not distinguish between greater or lesser levels of unconscionability—even the slightest hint of judicially perceived unfairness will suffice to meet

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[6] These five cases are the only ones identified by Stephen Broome where California appellate courts invalidated contracts as unconscionable outside the arbitration context. *See* Broome, 3 Hastings Bus. L.J. at 56-58. *See also Dalis v. Reinhard*, No. H031637, 2009 Cal. App. Unpub. LEXIS 2806 at *51 (Apr. 8, 2009) (upholding nonrecourse provision of a promissory note).

either prong of the test. Contrary to the mandate to treat arbitration contracts the same as any other contracts, California courts do not employ this "slightest hint" approach in unconscionability cases outside the context of arbitration; the sliding scale approach prevails in other contexts.

An extreme example of the failure to apply the sliding scale in an arbitration case was the California Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). There, the California Supreme Court declared an arbitration agreement unconscionable because it waived an employee's right to bring a class action lawsuit. It did so despite the fact that the employees were given an information packet on the effect of the arbitration agreement, were required to watch a video providing information on the arbitration process, were told to consult an attorney before signing if they were unclear on its legal effect, and were not only *given the choice not to sign*, but were given a grace period in which to *change their minds after signing*. *See id.* at 474 (Baxter, J., dissenting). In addition, the court ignored the fact that California workers who disapprove of arbitration requirements have many other options for seeking employment. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 361 (2007).

The *Gentry* court admitted that the employer did not compel workers to sign, but concluded that the agreement was "not entirely free from procedural unconscionability" because employees "felt at least some pressure" to sign it. *Gentry*, 42 Cal. 4th at 472. Such minimal—one might argue, illusory—procedural

unconscionability should have required an extremely high level of substantive unconscionability to result in an overall finding of unconscionability under the sliding scale test. But the court instead simply latched onto the class action waiver, which one would be hard pressed to describe as "extremely" unconscionable given the number of jurisdictions that find it perfectly legitimate.

As the dissenting justice observed, the court's justifications for resisting the use of arbitration in lieu of class action litigation may have made good policy arguments, but the Legislature had chosen to enact a procedure allowing for arbitration, and declared that public policy *favored* arbitration. The *Gentry* court simply "elevat[ed] a mere judicial affinity for class actions as a beneficial device for implementing the wage laws above the policy expressed by both Congress and our own Legislature." *Id.* at 477 (Baxter, J., dissenting). The court below similarly elevated the California judiciary's preference for class action lawsuits to serve as a veto for any arbitration provision, no matter how pro consumer in every other respect, if that provision required individual adjudication.

C. California Courts Hold That the Existence of Market Alternatives Defeats a Claim of Procedural Unconscionability—Except for Arbitration Contracts

The court below began its analysis by finding that the arbitration agreement was a contract of adhesion (defined simply as a "standardized contract" with non-negotiable terms). *Laster v. AT&T Mobility LLC*, 584 F.3d at 855. This Court, however, has refused to

invalidate arbitration agreements solely on the grounds that an individual must take-it-or-leave-it. *See Gilmer*, 500 U.S. 20 ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993) (arbitration agreements are enforceable even if they involve unequal bargaining power). *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (upholding a forum-selection clause in cruise-line ticket). Even California has no such requirement outside the context of arbitration. *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 449 (1986) (holding in a case involving a patent ownership dispute, "[t]he determination that a contract is adhesive is only 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned'") (citation omitted); *Holmes v. City of Los Angeles*, 117 Cal. App. 3d 212, 217 (1981) (same, in case involving pension contributions to public employees). As the Seventh Circuit noted in *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992-93 (7th Cir. 2008), form contracts are "common and enforceable" and serve an economically efficient purpose: "As long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention." *Id.* at 993.

Thus, under California law, contracts *in general* are not held to be procedurally unconscionable (a necessary element of an overall finding of unconscionability) when the non-drafting party had a choice whether to enter the contract at all; that is,

when market alternatives exist to provide the same good or service under contracts that have different or negotiable terms. *See Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699, 712 (1976) ("[T]he principles of adhesion contracts . . . do not bar enforcement of terms of a negotiated contract which neither limit the liability of the stronger party nor bear oppressively upon the weaker."); *Spinello v. Amblin Entm't*, 29 Cal. App. 4th 1390, 1396-97 (1994); *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 766-67 (1989). In *Spinello*, the court of appeal found that a form arbitration agreement was not adhesive because the plaintiff "had the opportunity to go elsewhere . . . [by] submitt[ing] his script to . . . other producers." 29 Cal. App. 4th at 1397. And in *Dean Witter*, the court recognized that "any showing of competition in the marketplace as to the desired goods and services defeats, as a matter of law, any claim of unconscionability." 211 Cal. App. 3d at 772. *See also Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1246 (2007) (noting that availability of other cable providers defeated claim of unconscionability); *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1320 (2005) ("'[P]rocedural element of unconscionability may be defeated[] if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable'" (citing *Dean Witter*, 211 Cal. App. 3d at 772).).

Courts' consideration of marketplace alternatives reflects sound public policy. Freedom of contract is based on the premise that people have preferences they wish to memorialize in the way they do business.

Individual consumers and employees place different values on the various provisions in a contract. Some consumers may be concerned about cost above all else. Others may pay particular heed to penalties for late payments or potential fees that may be incurred. Still others may place the highest value on being able to pursue future disputes in court rather than in arbitration. When companies in a competitive marketplace offer contracts that differ in these particulars, consumers and employees can choose the contract that best reflects their own values. Thus, the existence of marketplace alternatives is properly held to vitiate a claim of procedural unconscionability. And as noted above, if there is no procedural unconscionability, then a claim of overall unconscionability must fail.

In California, however, this general rule is wholly ignored in the context of arbitration contracts. For example, in *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975 (2010), a patent attorney employed by a multinational corporation filed a wrongful termination lawsuit against his employer. Amgen moved to compel arbitration, based on a provision in the employment contract. The court held that, even though the attorney was not "an uneducated, low-wage employee without the ability to understand that he was agreeing to arbitration," the contract was procedurally unconscionable "only because the offer was presented on a take-it-or-leave-it basis." *Id.* at 981.[7] *See also*

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[7] The court made this holding even while describing the plaintiff as belonging to that rare class of "'sought-after employees' who are positioned to reject offers of employment" if Amgen's contract was not to his liking. *Dotson*, 181 Cal. App. 4th at 981 n.2 (citing *Armendariz*, 24 Cal. 4th at 115). Ultimately, the court upheld the

(continued...)

Parada v. Superior Court, 176 Cal. App. 4th at 1573 (finding low to medium degree of procedural unconscionability in arbitration contract despite "many realistic alternatives"); *Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571, 586 (2007) (finding procedural unconscionability even where market alternatives existed because the contract was drafted by the party with significantly greater bargaining power and was presented on a take-it-or-leave-it basis); *Aral v. EarthLink, Inc.*, 134 Cal. App. 4th 544, 557 (2005) (finding "quintessential procedural unconscionability" where an arbitration agreement is presented on a take-it-or-leave-it basis with no opportunity to opt out); *Szetela v. Discover Bank*, 97 Cal. App. 4th at 1100 (holding that market alternatives giving the customer the ability to walk away rather than sign the offending contract was not dispositive); *Jackson v. S.A.W. Entm't, Ltd.*, 629 F. Supp. 2d 1018, 1023 (N.D. Cal. 2009) (applying California law to invalidate arbitration provision in employment contract because there was no "opportunity to negotiate or to opt out of the arbitration provision and still be hired"). Even in a case involving nonessential recreational services—a subject for which California courts have found the availability of market alternatives to be an important factor in denying claims of procedural unconscionability[8]—the California Court of Appeal held that an arbitration contract containing a class-action waiver

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[7] (...continued)
arbitration contract, based largely on the sophistication of the plaintiff and the lack of substantive unconscionability. *Id.* at 985, 987.

[8] *See, e.g., Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th at 1246.

was procedurally unconscionable. *Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th at 823 (contract to participate in Mount Kilimanjaro hiking expedition).

Market alternatives did exist in this case. Declaration of Joanne Savage in Support of Defendant AT&T Mobility LLC's Motion to Compel Arbitration and to Dismiss Claims of *Concepcion* Plaintiffs Pursuant to the Federal Arbitration Act, Ninth Circuit Excerpts of Record at 291-413 (providing documentation that when the Concepcions first contracted for wireless service from Cingular (now AT&T), Sprint and Nextel permitted class arbitration and Virgin Mobile did not require arbitration of disputes at all; when the Concepcions renewed their service in 2006, neither Virgin Mobile nor TracFone required arbitration of disputes).

Applying the market alternatives factor to procedural unconscionability claims differently, depending on whether the contract involves arbitration or not, violates this Court's command that courts cannot "rely on the uniqueness of an agreement to arbitrate as the basis for a state-law holding that enforcement would be unconscionable." *Perry v. Thomas*, 482 U.S. at 492 n.9.

III

CALIFORNIA'S HOSTILITY TO ARBITRATION INFECTS CONTRACTS NATIONWIDE

The courts' greater receptivity to unconscionability arguments has led to the expected result: Where unconscionability challenges once appeared in less than 1% of all arbitration-related cases, more

recently they have appeared in 15-20% of all cases involving arbitration. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U.L. Rev. 1420, 1441 (2008). The issue presented by this case does not just affect California and the Ninth Circuit, however, because federal courts will also invalidate any arbitration contract choice-of-law provision that does not specify California law as controlling. *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086 (9th Cir. 2010), adopting the reasoning of *Oestreicher v. Alienware Corp.*, 322 Fed. App'x 489 (9th Cir.), *aff'g* 502 F. Supp. 2d 1061, 1065-69 (2009). This is another maneuver targeted specifically at arbitration contracts.

The general rule is that where a choice of law provision exists in a private contract, California courts will honor the provision. *See Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464-65 (1992) ("In determining the enforceability of arm's-length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement section 187, which reflect a strong policy favoring enforcement of such provisions."). The contract challenged in *Omstead* had a choice-of-law provision that all disputes would be resolved under Texas law, but the Ninth Circuit held that "class action waiver is unconscionable under California law because it satisfies the *Discover Bank* test, and California has a materially greater interest than Texas in applying its own law." *Omstead*, 594 F.3d at 1086. *See also Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1083 (9th Cir. 2008) (holding that "if Citibank's class arbitration waiver is unconscionable under California law, enforcement of the waiver under South

Dakota law would be contrary to a fundamental policy of California" and remanding to district court for findings as to procedural unconscionability given the ability of cardholders to opt-out of the arbitration provision); *Tamayo v. Brainstorm United States*, 154 Fed. App'x. 564, 566 (9th Cir. 2005) ("To the extent that Ohio law would enforce the class-action waiver at issue, . . . it would be contrary to California public policy and thus not applicable."); *Davis v. Chase Bank USA, N.A.*, 299 Fed. App'x. 662, 664 (9th Cir. 2008) (disregarding Delaware choice of law provision because it would permit a class action waiver in an arbitration agreement, contrary to California law).

Moreover, because class action waivers are upheld in most other courts, consumers who wish to sue national corporations (and their counsel) can circumvent those waivers by the simple mechanism of initiating a class action lawsuit in California. They need only to find a plaintiff in California to take the lead and file suit in state court, and then, once the lawsuit is under way, broaden the class action to include plaintiffs from around the country. *See* Aaron C. Gundzik & Rebecca Gilbert Gundzik, *Will California Become the Forum of Choice for Attacking Class Action Waivers?*, 25 Franchise L.J. 56, 59 (2005). Thus, consumers and businesses nationwide are adversely affected by the California courts' refusal to enforce class action waivers in arbitration.

CONCLUSION

The California courts consistently hold arbitration agreements to a different standard when it comes to unconscionability, and the decision below represents

the latest, and most extreme, example. California courts, and federal courts applying California law, are employing a special unconscionability analysis to arbitration contracts to thwart the use of arbitration. This Court should reverse the decision below and enforce the pronouncements in *Perry* and *Doctor's Associates* that unconscionability analysis may not single out arbitration contracts and treat them differently than other kinds of contracts.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE STATES OF SOUTH CAROLINA AND UTAH IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICI CURIAE* THE STATES OF SOUTH CAROLINA AND UTAH IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The *Amici* States, each of which appears in this Court through their respective Attorney General, have a vital interest in encouraging the widespread use of alternative dispute resolution programs that facilitate fair and prompt resolution of consumer complaints against companies. In the *Amici* States' view, the judgment below, if left undisturbed, could make that task far more difficult and discourage companies that operate in multiple States from implementing innovative, pro-consumer arbitration programs.

ARGUMENT

I. THE *AMICI* STATES FAVOR ARBITRATION AS A MECHANISM FOR THEIR CITIZENS TO RESOLVE CONSUMER DISPUTES

Congress and this Court have long recognized the importance and value of arbitration as an alternative dispute resolution mechanism. Given the Court's familiarity with the text and purpose of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and recognition of the virtues of arbitration in numerous decisions over the past three decades, the *Amici* States need only recite the Court's core observations in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). In that case, the Court emphasized that "adaptability and access to expertise are hallmarks of arbitration." *Id.* at 633. For that reason, an agreement to arbitrate often reflects "a judgment that streamlined proceedings and expeditious results will best serve [the parties'] needs," and "a desire to keep the effort and expense required to resolve a dispute within manageable bounds." *Id.*

II. A CLASS-BASED APPROACH TO RESOLVING CLAIMS HAS NOT BENEFITTED CONSUMERS

Class-wide arbitrations are not inherently the best means to ensure prompt and fair recovery for consumers or to deter corporate wrongdoing. Nor are they necessary to vindicate consumer claims when consumers have the incentive and a full and fair opportunity to resolve their claims on an individual basis. Consumer class members typically receive only a fraction of the amount of their claim, often

pennies on the dollar.[1] Consequently, few class members—generally less than five percent—even bother to file a claim.[2] Furthermore, class-wide arbitrations are apt to be as expensive and time-consuming as judicial class actions, while lacking many of the procedural safeguards afforded in judicial actions, such as appellate review.[3] Class-wide arbitration procedures, therefore, frequently defeat the fundamental purpose of alternative dispute resolution—prompt and efficient disposition of claims.

Individual arbitrations, on the other hand, are far more likely to result in a prompt and fair recovery for

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[1] *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)(A), 119 Stat. 4, 4 (2005) (congressional finding that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . class members [are left] with coupons or other awards of little or no value").

[2] *See, e.g.*, *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 649-50 (7th Cir. 2006) (noting only "a paltry three percent" of class members had filed claims under the settlement); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005) (noting a redemption rate of class action coupons in the range of one to three percent); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. Rev. 991, 1035 (2002) (reporting consumer class action settlements with redemption rates as low as three percent).

[3] *See, e.g.*, *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) ("Judicial review of arbitration panel decisions is extremely limited, indeed, it has been described as 'among the narrowest known to law.'" (citation omitted)); Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, Harv. Bus. Rev. 120 (May-June 1994) (In complex cases, arbitration frequently "costs like the litigation it's supposed to prevent.").

consumers, provided that consumers are properly incentivized, and the arbitration provisions contain safeguards necessary to protect consumers. The *Amici* States believe that a valid, enforceable arbitration mechanism should satisfy the following criteria, which would benefit consumers and businesses alike:

(1) simple filing requirements;

(2) a convenient, prompt, and inexpensive arbitration process;

(3) an independent, non-biased, and neutral arbitrator;

(4) the availability of all forms of individual relief (including punitive damages and injunctions) that a court could award; and

(5) adequate incentives for consumers to file claims, even small claims, such as a meaningful premium on the award, as well as attorneys' fees, if the amount awarded by the arbitrator exceeds the company's settlement offer.[4]

An arbitration program that satisfies these criteria should be encouraged by the law, not discouraged.

III. DETERRENCE OF CORPORATE WRONGDOING DOES NOT REQUIRE A CLASS-WIDE ARBITRATION PROCEDURE

The premise of the California Supreme Court's holding that agreements that require individual arbi-

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[4] This case itself has an example of such a meaningful premium. As the Ninth Circuit noted, the AT&T Mobility premium payment provision in this case "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim." *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009).

tration are unconscionable exculpatory clauses is that public enforcement is inadequate, and that private enforcement in the guise of class actions is indispensable for deterring corporate wrongdoing. That premise is offensive to a co-equal branch of government. It also is entirely lacking in empirical support. There is no evidence that class-based procedures are the most effective and efficient method to deter corporate wrongdoing. More to the point, the *Amici* States have concluded that class proceedings are not necessary for there to be such deterrence. The Attorneys General of the *Amici* States have no compunction about investigating and prosecuting companies civilly and criminally to the fullest extent of the law whenever the Attorneys General have reason to believe that there has been systemic fraud, misrepresentation, or other serious wrongdoing committed against consumers. The Attorneys General of the *Amici* States have always carried out those responsibilities by every available means—and will continue to do so.

To take only a few recent examples, in 2009, the South Carolina Attorney General recovered $45 million from Eli Lilly & Co. regarding the marketing of the company's antipsychotic medications and $1.5 million from Dell, Inc. to resolve issues South Carolina customers alleged in connection with Dell's customer service department and in 2006, $1.2 million from Ameriquest Mortgage Company on behalf of more than 3,000 South Carolina customers subject to alleged predatory lending practices.[5] Similarly, in

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[5] Press Release, S.C. Attorney General, $45 Million Eli Lilly Settlement Nation's Largest (Oct. 23, 2009); Press Release, S.C. Attorney General, Attorneys General Work Deal to Debug Dell's Customer Service (Jan. 12, 2009); Press Release, S.C. Attorney

2007, the Utah Attorney General recovered $1.8 million from Ameriquest on behalf of more than 1,700 Utah consumers subject to predatory lending practices and in 2005, reached a settlement with Blockbuster Inc. that allowed Utah consumers who had been misled by Blockbuster's advertising campaign to receive restitution.[6]

IV. CALIFORNIA'S POLICY OF FAVORING CLASS-BASED PROCEDURES SHOULD NOT BE PERMITTED TO DISCOURAGE ARBITRATION IN OTHER STATES

California courts have used the unconscionability doctrine to favor class-action litigation and arbitrations, particularly in cases involving a large number of consumers with small amounts of damages. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100, 1105-06 (Cal. 2005). Many other States have declined to adopt this policy.

In *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 198-202 (Tex. App. 2003), the Texas Court of Appeals conducted a thorough analysis of—and ultimately rejected—the contention that a prohibition on class actions renders an arbitration agreement fundamentally unfair. The court rebuffed as purely speculative the argument that, without class actions, individual plaintiffs would refrain from seeking potentially small recoveries. *Id.* at 199-200. The court found that inasmuch as a class action is a procedural

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General, Ameriquest to Pay $1.2 Million to 3,000+ S.C. Customers (Jan. 23, 2006).

[6] Press Release, Utah Attorney General, Utahns Receive $1.8 Million from Ameriquest Mortgage Settlement (Dec. 14, 2007); Press Release, Utah Attorney General, Shurtleff Joins Settlement over Blockbuster's "No Late Fees" Claims (Apr. 7, 2005).

mechanism, not a substantive right, prohibiting class actions would not by itself deprive potential plaintiffs of the substantive ability to pursue their legal interests. *Id.* at 200.

The court accordingly held that so long as an arbitration agreement does not limit or impair a plaintiff's underlying substantive rights, the fact that a plaintiff could also have the procedural option of proceeding on a class basis could not outweigh the policy interest in enforcing private agreements to arbitrate according to their terms. *Id.* In the court's words, even assuming that "individual arbitrations, lawsuits, or trials . . . in which each consumer seeks a small damages amount [might] drain consumer and judicial resources," the policy and benefits of encouraging arbitration nonetheless "'*require*[]'" overriding such concerns, regardless of the benefits of class actions. *Id.* at 201 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)).[7]

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[7] A number of other state courts have reached the same conclusion after similar analyses. *See, e.g.*, *Rains v. Found Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001) ("The Court finds nothing unconscionable about [an arbitration clause barring class-wide arbitrations] and finds [it] enforceable."); *Walther v. Sovereign Bank*, 872 A.2d 735, 751 (Md. 2005) ("[W]e do not find the no-class-action provision to be so one-sided or oppressive to petitioners as to render the arbitration agreement at issue unconscionable."), *Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (App. Div. 2006) ("[T]he fact that the arbitration agreements effectively preclude her from pursuing a class action does not alone render them substantively unconscionable."); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (holding that a no class action provision in credit card

California's policy preference should not be imposed on the *Amici* States or, for that matter, on any other State. Yet, the Ninth Circuit has held that California law governs the enforceability of such arbitration provisions in the contracts of out-of-state customers of California-based businesses ***even when those contracts choose the law of the customer's home state***. *Masters v. DirecTV, Inc.*, Nos. 08-55825, 08-55830, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009). Taken together, the decision below and *Masters* effectively preclude enforcement of any arbitration provision between a California-based company and any of its customers who live in any other State when the arbitration provision does not provide for class-wide arbitration.

Non-California consumers should not be denied the benefits of consumer-friendly arbitration provisions when dealing with a California-based company. Even putting aside the Ninth Circuit's aggressive use of choice-of-law principles, because businesses tend to prefer uniformity in their operations, there is every reason to be concerned that, if California's across-the-board ban on individual arbitration survives, many companies will drop their arbitration provisions nationwide. Indeed, it is the *Amici* States' understanding that Amazon.com did so after the

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agreement was not unconscionable because plaintiff "retain[ed] all substantive remedies he would otherwise have without" the provision).

The above decisions, like the case before this Court and the *Amici* States' position here, do not involve state statutes requiring or authorizing class procedures in a specific type of case. *See, e.g., Herron v. Century BMW*, 693 S.E.2d 394, 399-400 (S.C. 2010) (the South Carolina Legislature's Dealers Act made class actions non-waivable in suits against car dealers).

Washington Supreme Court adopted a rule similar to California's. The small minority of States that refuse to enforce incentive-laden arbitration provisions like the one at issue here should not be permitted to discourage companies that operate around the country from creating and maintaining arbitration programs that enable customers to resolve claims speedily and inexpensively.

CONCLUSION

In the *Amici* States' view, the enforceability of a particular arbitration provision should depend upon whether it provides consumers with sufficient incentives to pursue their rights, and a full and fair opportunity to vindicate their rights quickly and efficiently. Because the arbitration clause in this case does just that, the judgment below should be reversed.

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